Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ESTATE OF BERNADETTE F. LEGO, PETITIONER

v.

MICHAEL O. LEAVITT, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After an order by an administrative law judge ("ALJ") rejecting a request for hearing on denial of Medicare benefits, and a district court dismissal of Petitioner's Amended Complaint for review of that order under 42 U.S.C. §405(g) ("Section 405(g)"), did the 10th Circuit err in affirming that dismissal even though the ALJ order was a "final decision" of the Secretary "after a hearing" under the circumstances?

2. Apart from whether judicial review is available under Section 405(g), did the 10th Circuit err in affirming the district court dismissal where the Amended Complaint alleged a colorable claim of a deprivation of due process by virtue of the anomalous mechanism employed by the ALJ in rejecting the hearing request?

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The Estate of Bernadette F. Lego, through counsel, respectfully petitions this Court for a writ of certiorari to review the Order and Judgment (the "Opinion") in *Estate of Bernadette F. Lego v. Michael O. Leavitt*, No. 06-1498 (10th Cir. 2007), and its erroneous affirmation of district court and administrative orders.

OPINIONS BELOW

The Opinion, designated as "unpublished" by the 10th Circuit, appears at 2007 U.S. App. LEXIS 18535 and is included at pgs. 1a thru 11a of the Appendix. The September 25, 2007 Order of the 10th Circuit, denying the Estate's Petition for Rehearing with respect to the Opinion, is unpublished and appears at pg. 36a of the Appendix. The unpublished September 12, 2006 Order (the "September Order") in *Estate of Bernadette F. Lego v. Michael O. Leavitt*, Case No 05 cv 1260 AP- JLK, (D.Colo. 2006), dismissing the Estate's Amended Complaint for judicial review of certain Medicare administrative orders, appears at pg. 12a of the Appendix.

Those administrative orders (the "Administrative Orders") are (i) the May 5, 2005 "Action of Medicare Appeals Council on Request for Review" (the "Review Denial") of the Departmental Appeals Board (the "DAB") of the Medicare Appeals Council, App. at pgs. 14a thru 15a, (ii) the December 29, 2004 Order of Dismissal (the "Dismissal Order") in *In re Bernadette Lego (Deceased)*, No. XXX-XX-8288, Social Security Administration Office of Hearings and Appeals (2004), App. at pgs. 16a thru 20a, (iii) the October 11, 2001 "Continued Stay Review/Notice Of Non-Coverage (Denial Notice Upheld)" (the "First

Review Decision") by the Colorado Foundation For Medical Care ("CFMC"), App. at pgs. 25a thru 29a, and (iv) the CFMC October 22, 2001 "Reconsideration Notification (Continued Stay Denial Notice Decision Upheld)" (the "Reconsideration Decision"), App. at pgs. 30a thru 35a.

JURISDICTION

The Opinion was issued on August 2, 2007. The Estate's September 17, 2007 Petition For Rehearing Pursuant To Fed.R.App.P. 40 was denied by Order dated September 25, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, 42 U.S.C. §1395w-22.(g)(5), 42 U.S.C. §405(g), and Rules 10-16 of this Court.

RELEVANT PROVISIONS INVOLVED

Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

Federal Statutory Provisions

The United States Code, 42 U.S.C. §1395w-22.(g)(5), provides in pertinent part:

> An enrollee with a Medicare+Choice plan of a Medicare+Choice organization under this part [42 U.S.C. §§ 1395w-21 et seq.] who is dissatisfied by reason of the enrollee's failure to

> receive any health service to which the enrollee believes the enrollee is entitled and at no greater charge than the enrollee believes the enrollee is required to pay is entitled, if the amount in controversy is $ 100 or more, to a hearing before the Secretary to the same extent as is provided in section 205(b) [42 U.S.C. § 405(b)], and in any such hearing the Secretary shall make the organization a party. If the amount in controversy is $ 1,000 or more, the individual or organization shall, upon notifying the other party, be entitled to judicial review of the Secretary's final decision as provided in section 205(g) [42 U.S.C. § 405(g)], and both the individual and the organization shall be entitled to be parties to that judicial review. In applying subsections (b) and (g) of section 205 [42 U.S.C. § 405(b) and (g)] as provided in this paragraph, and in applying section 205(l) [42 U.S.C. § 405(l)] thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively. . . .

The United States Code, 42 U.S.C. §405(b), provides in pertinent part:

> (b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations. (1) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual

> applying for a payment under this title. . . Upon request by any such individual or upon request by a . . . surviving . . .husband, [or] widower who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. . .

The United States Code, 42 U.S.C. §405(g), provides in pertinent part:

> (g) Judicial review. Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. . . . The judgment of the court shall be final except

> that it shall be subject to review in the same manner as a judgment in other civil actions.

Federal Regulations

The Code of Federal Regulations, 42 C.F.R. §422.600, provides in pertinent part: "(a) If the amount remaining in controversy is $100 or more, any party to the reconsideration (except the M+C organization) who is dissatisfied with the reconsidered determination has a right to a hearing before an ALJ. . ."

The Code of Federal Regulations, 42 C.F.R. §422.562(d), provides in pertinent part: "Unless this subpart provides otherwise, the regulations in 20 C.F.R., part 404, subparts J and R (covering, respectively, the administrative review and hearing process and representation of parties under title II of the Act), apply under this subpart to the extent they are appropriate."

The Code of Federal Regulations, 42 C.F.R. §422.608, provides in pertinent part:

> Any party to the hearing, including the M+C organization, who is dissatisfied with the ALJ hearing decision, may request that the Board review the ALJ's decision or dismissal. Regulations located at 20 CFR 404.967 through 404.984 regarding SSA Appeals Council Review apply to Board review for matters addressed by this subpart."

The Code of Federal Regulations, 42 C.F.R. §422.612 provides in pertinent part:

> (a) . . .Any party, including the M+C organization, may request judicial review (upon notifying the other parties) of an ALJ's decision if--(1) The Board denied the party's request for review; and (2) The amount in controversy is $1,000 or more. . . .(c) How to request judicial review. A party must file a civil action in a district court of the United States in accordance with section 205(g) of the Act (see 20 CFR 422.210 for a description of the procedures to follow in requesting judicial review).

The Code of Federal Regulations, 20 C.F.R. §404.957, provides in pertinent part:

> An administrative law judge may dismiss a request for a hearing under any of the following conditions: . . .(b)(1)(i) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and you have been notified before the time set for the hearing that your request for hearing may be dismissed without further notice if you did not appear at the time and place of hearing, and good cause has not been found by the administrative law judge for your failure to appear. . .

The Code of Federal Regulations, 20 C.F.R. §404.967, provides in pertinent part:

> If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action. The

> Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge. The Appeals Council shall notify the parties at their last known address of the action it takes.

The Code of Federal Regulations, 20 C.F.R. §404.981, provides in pertinent part:

> The Appeals Council may deny a party's request for review or it may decide to review a case and make a decision. The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised. You may file an action in a Federal district court within 60 days after the date you receive notice of the Appeals Council's action.

STATEMENT

The Amended Complaint in the district court, App. at pgs. 82a thru 91a, sought judicial review of Administrative Orders relating to a Medicare+Choice Plan (the "Plan") issued by PacifiCare of Colorado, Inc. ("Secure Horizons/Pacificare") and covering the Estate's decedent, Bernadette F. Lego ("Mrs. Lego"). Mrs. Lego was at all relevant times enrolled in the Plan.[1] Amended Complaint, at ¶2. She was admitted to Porter Hospital ("Porter") in Denver, Colorado under

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[1] Medicare+Choice plans are governed by Part C of the Social Security Act (42 U.S.C. §1395w-21 et seq.).

the Plan in August of 2001 for treatment of complications related to a brain tumor.[2] At the end of September of 2001 Secure Horizons/Pacificare and Porter announced that Mrs. Lego no longer needed continued acute care at Porter (although her treating physician had not so determined, and believed she needed such continued acute care) and advised that her hospital stay would no longer be covered under the Plan. *Id.* at ¶7. Mrs. Lego then lodged an administrative appeal, contending Plan coverage should continue for her stay at Porter. *Id.* at ¶¶8-10. When that appeal was denied, *id.* at ¶10, she sought review by the ALJ[3] who ultimately scheduled a hearing (the "Original Hearing"). *Id.* at ¶11.

R.T. Lego ("Lego"), husband and legal representative of Mrs. Lego, appeared at the Original Hearing and was there notified (by an ALJ assistant) that further adjudicatory proceedings were apparently unnecessary because Porter, through counsel, had earlier advised the ALJ's office that it would not appear, nor contest Mrs. Lego's position, nor otherwise participate in such proceedings. *Id.* at ¶12. Porter did not in fact appear at the Original Hearing, nor otherwise contest or participate in the appeal process then before the ALJ, and Lego produced at that time a formal Statement from Porter showing no claimed

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[2] The facts related to Mrs. Lego's illness are set forth in the Amended Complaint at ¶ 6.

[3] On December 21, 2001 Mrs. Lego filed a Request for Hearing before the ALJ (the "Hearing Request"). Amended Complaint at ¶11. A copy of an Exhibit to the Hearing Request containing strong support for Mrs. Lego's continued hospitalization at Porter by a coterie of physicians appears at pgs. 37a thru 51a of the Appendix.

balance owing on Mrs. Lego's account in relation to the hospital for services bearing on the subject of the Hearing Request. *Id.* Lego was also informed at the Original Hearing that Porter's prior money claim related to hospital services so provided to Mrs. Lego during the subject stay would be dropped, and that a formal confirmation of case disposition, reflecting these developments, would be forthcoming in due course. *Id.*

Months later Lego learned of an ALJ turnabout; the Original Hearing would continue and had to be rescheduled. *Id.* at ¶13. After resetting several times to accommodate the ALJ's schedule, or that of the ALJ's own expert, the hearing was finally set for Monday, November 22, 2004 (the "November Hearing").[4] *Id.* However, on the immediately preceding Friday Lego, who was seriously ill and unable to attend as scheduled, advised the ALJ's office and pursued arrangements for a continuance. *Id.* at ¶14.

The ALJ, as telephonically confirmed that Friday by a member of his staff, was troubled by the age of the case and initially resisted even considering medical reasons for a continuance. *Id.* at ¶14. He would only reconsider, she said, if he could personally confer (without participation of counsel) that very afternoon with Lego's physician (the "Physician" or "Dr. Capek"). *Id.* An impromptu telephone conference between the ALJ and the Physician, one on one, proved feasible and was held that day. *Id.* at ¶15. On conclusion the Physician told Lego his impression that

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[4] Mrs. Lego died in June of 2002. Proceedings were thereafter continued by the Estate.

(i) a continuance would likely be granted under the circumstances, (ii) the ALJ would first discuss the matter with opposing counsel, and (iii) Lego would be apprised via telephone later that day of a decision on the continuance. *Id.* at ¶16. When no such advisement was received that entire weekend, Lego (with family member assistance) prepared and had filed, just before the November Hearing began, a written motion for continuance (the "Emergency Motion") (App. at pgs. 52a thru 58a), but he was unable for health reasons to personally attend. Amended Complaint at ¶17. Unbeknownst to Lego at the time, the ALJ took testimony from representatives of Porter at the November Hearing. App. at pg. 20a, ¶2.

Weeks later the ALJ issued the Dismissal Order, dismissing the proceedings based on findings which manifestly misquoted, and materially misapprehended, the Physician on Lego's health issues. For example, the Dismissal Order acknowledged that the ALJ spoke with Dr. Capek and, based on the latter's affidavit, found that Lego was only medically restricted to a forty (40) hour work week (or an eight (8) hour workday), and then used that finding as support for denial of the continuance. App. at pgs. 18a thru 19a. However, it is clear from ¶10 of Dr. Capek's Affidavit (App. at pg. 61a), contrary to the facial language of the Dismissal Order on the point, that Lego had, since mid-October of 2004, being four weeks prior to the November Hearing, been restricted to a four (4) hour work day, or a twenty (20) hour work week, not the forty (40) hour per week restriction imposed for an earlier period, as acknowledged in ¶7 of Dr. Capek's Affidavit (App. at pg. 60a).

Additional findings on case age, used by the ALJ to support dismissal, also materially misapprehended the chronology of the case. The ALJ found that the case was four years old at the time the Dismissal Order, and he considered that age to be a critical factor in dismissing the Hearing Request in December of 2004. App. at pg. 19a. It is undisputed, however, that the case was initiated on December 21, 2001, and the Original Hearing was not noticed by the ALJ until May 3, 2003, over 16 months later. App. at pg. 16a. The case was actually less than three years old at the time of the November Hearing.

The Dismissal Order acknowledges reliance on the testimony of Porter representatives taken at the November Hearing, App. at pg. 20a, but the substance of such testimony was not disclosed by the ALJ to the Estate prior to dismissal, nor in the Dismissal Order, and neither Lego nor the Estate was given an opportunity to reply to it.

The Estate's appeal to the DAB of the Dismissal Order, the First Review Decision and the Reconsideration Decision, App. at pgs. 61a thru 81a, was rejected via the Review Denial. Its ensuing district court action sought judicial review under 42 U.S.C. §1395w-22.(g)(5), 42 U.S.C. §405(g), 20 C.F.R. §404.981 and 42 C.F.R. §422.612, and also alleged error and constitutional violations in the ALJ's handling of the matter, including irregular hearing procedures (the "Impromptu Hearing") respecting the Physician's input, the November Hearing, the corresponding disposition of the request for a continuance, and the Dismissal Order.

The Respondent/Secretary of the Department of Health and Human Services (the "Secretary"), as district court defendant, challenged the Amended Complaint on jurisdictional grounds, i.e., that there was no basis for judicial review of Administrative Orders in the district court. The September Order dismissed the case without explanation, noting only that the Estate failed to exhaust administrative remedies.

The Plaintiff's Notice of Appeal of the September Order to the 10th Circuit was filed on November 13, 2005. That Court had jurisdiction pursuant to 42 U.S.C. §1395w-22.(g)(5), 42 U.S.C. §405(g) and 28 U.S.C. §1291. The Opinion affirmed the September Order, holding that (i) judicial review of dismissal of the Hearing Request was not available under Section 405(g) because such dismissal did not constitute a final decision of the Secretary after a hearing, and (ii) the Amended Complaint did not state a colorable constitutional claim.

REASONS FOR GRANTING THE PETITION

A. The Opinion Has Decided An Important Federal Question on Availability of Judicial Review Under 42 U.S.C. §405(g) Under the Circumstances Here in a Way That Conflicts with Prior Decisions of this Court, and of another Circuit Court.

1. The Estate Exhausted Its Administrative Remedies Before Seeking Judicial Review.

The path to judicial review of the Dismissal Order starts with 42 U.S.C. §1395w-22(g)(5). This

Section enables such review of a final decision of the Secretary after a hearing on challenges to certain denials of Medicare+Choice benefit entitlements. A hearing and such review are available to the same extent provided Social Security claimants under 42 U.S.C. §405(b) ("Section 405(b)") and Section 405(g), respectively, with the Secretary substituted for the Commissioner of Social Security. *Id.* The regulations governing the Medicare+Choice Program are provided in 42 C.F.R. Part 422, including incorporation of other regulations on applicable hearing and review procedures.

The Hearing Request was filed pursuant to 42 C.F.R. §422.600 which allows a hearing before an ALJ under Section 405(b) ("Section 405(b) Hearing") to challenge an agency benefits determination. Applicable hearing procedures are covered at 20 C.F.R., §404.900 through §404.999. *See* 42 C.F.R. §422.562(d); *see also* 42 C.F.R. §422.608 (making the regulations located at 20 C.F.R. §404.967 through 404.984 applicable to review of an ALJ decision after such a hearing). Once a request for hearing is filed, the ALJ can dismiss it only in certain limited circumstances, e.g., if the claimant did not appear at the time and place scheduled for the proceeding, and good cause has not been found by the ALJ for the failure to appear. 20 C.F.R. §404.957. Any such dismissal is subject to review by the DAB if it grants a claimant's request therefor. 20 C.F.R. §404.967. Upon denial of a request for review, the party denied such review is entitled to file an action for judicial review. 20 C.F.R. §404.981. To obtain such judicial review in Medicare+Choice cases, a party must file a civil action in a district court of the United States in accordance with Section 405(g), and the regulations

at 20 C.F.R. 422.210 govern the procedures for such filing. *See* 42 C.F.R. §422.612.

The Hearing Request here resulted in the scheduling of the Original Hearing and the November Hearing, and was dismissed by the ALJ on the basis that, counsel's illness notwithstanding, the Estate had not shown good cause for nonappearance at the November Hearing (which was convened and at which representatives of Porter appeared, and during which they **testified** respecting matters related to the requested continuance, and that testimony implicitly related to dismissal of the Hearing Request). App. at pg. 20a. The Estate's request for DAB review of the Dismissal Order was denied. App. at pgs. 14a thru 15a. The Estate had thus exhausted all administrative channels provided by the Secretary to have the Dismissal Order (and inherently the First Review Decision and the Reconsideration Decision) reviewed, and was thus entitled to, and did seek, judicial review as authorized by Section 405(g) and 20 C.F.R. §404.981.

2. Section 405(g) Provides for Judicial Review of the Dismissal Order After Such Exhaustion of Administrative Review.

Judicial review is available with respect to a "final decision" of the Secretary made "after a hearing" to which the claimant was a party. Section 405(g). Here, the Dismissal Order was entered after a hearing, indeed after two hearings scheduled pursuant to a request for a Section 405(b) Hearing (i.e., the Original Hearing and the November Hearing), and also after the Impromptu Hearing (a hearing essentially subsumed within the November Hearing). It was a final decision

of the Secretary, the Estate having exhausted all channels provided for administrative review.

Under long-standing decisions of this Court, notably *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975), review of the Dismissal Order is available under Section 405(g).

In *Mathews* this Court addressed the issue of whether judicial review was available under Section 405(g) of a decision terminating certain social security benefits, even through no Section 405(b) Hearing on denial of initial benefits was held and even though the claimant did not exhaust administrative procedures before seeking judicial review. Citing *Weinberger*,[5] another case in which the claimant sought judicial review of a benefits denial without first seeking a Section 405(b) Hearing and without otherwise exhausting administrative remedies, *Mathews* held that the jurisdictional requirement in Section 405(g) that there be a "final decision" made "after a hearing" actually did not literally mean that a Section 405(b) Hearing need be requested, commenced or concluded on the merits in every case, but rather that two foundational elements be satisfied for judicial review under Section 405(g).

The first requirement: "a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no 'decision' of any type. And some decision by the Secretary is clearly required by the statute." *Mathews*, 424 U.S. at 328. This jurisdictional requirement cannot be waived by the Secretary. *Id.*

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[5] 422 U.S. at 764-767.

Second, "that the administrative remedies prescribed by the Secretary be exhausted" or waived. *Id.* Elaborating on the second element, the Court stated: "the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer." *Id.* at 330. Where these two elements are met (i.e., a benefit claim is made, and there is an exhaustion of administrative remedies or waiver thereof), judicial review under Section 405(g) is available.

Various lower courts have recognized, based on this two-element analysis in *Mathews* and *Weinberger*, that judicial review of an ALJ's decision dismissing a hearing request, because a claimant has purportedly failed to show good cause for non-appearance, is available, *See, e.g., Granberg v. Bowen*, 716 F. Supp. 874, 877 (D. Pa. 1989) (judicial review available per *Mathews/Weinberger* two-element test); *Saephan v. Barnhart*, 2003 U.S. Dist. LEXIS 17887; 90 Soc. Sec. Rep. Service 613 (N.D.Cal. 2003) (same); *see also Bellantoni v. Schweiker*, 566 F. Supp. 313, 315 (E.D.N.Y. 1983) (judicial review of Appeals Council dismissal of review request, which found no good cause to extend the time for filing request, permitted under Section 405(g) even though dismissal order was not one after final hearing on the merits, citing *Mathews/Weinberger* two-element test).

Here, it is undisputed that a claim for benefits was made. Moreover, the Estate has exhausted available administrative review channels, and been denied final review by the Secretary, and thus fulfilled

"the internal needs of the agency". Under the circumstances, *Mathews* and *Weinberger* both provide that judicial review of the Dismissal Order under Section 405(g) is available to the Estate here.

3. Contrary to the Opinion, this Court's Later Decision in Califano v. Sanders, and the 5th Circuit's Decision in Brandyburg v. Sullivan, Do Not Foreclose Judicial Review Under Section 405(g) Here.

After the Estate sought judicial review as expressly authorized under the circumstances by 20 C.F.R. §404.981 and 42 C.F.R. §422.612, the Secretary moved to dismiss on the theory that Section 405(g) did not grant the district court jurisdiction to review the Dismissal Order or Review Denial. According to the Secretary, judicial review under Section 405(g) is available only for final decisions by the Secretary after *a hearing on the merits of the underlying claims*, and not for final decisions after hearings on "procedural matters", such as whether there was good cause for the Estate's non-appearance at the November Hearing. The district court's one-page September Order, App. at pg. 12a, granted dismissal without discussion, stating merely that the Estate (despite seeking, and then being denied DAB review) had somehow failed to exhaust its administrative remedies. The Opinion affirms dismissal for that purported failure, relying on *Califano v. Sanders*, 430 U.S. 99 (1977), and on a case which it (erroneously) deems virtually identical to this one, *Brandyburg v. Sullivan*, 959 F.2d 555 (5th Cir. 1992), to hold that Section 405(g) doesn't contemplate judicial review for procedural dismissals after a hearing, but only for decisions on the merits after hearing. The 10th

Circuit's reliance on those cases here, however, is misplaced, and they do not support its holding.

a. *Califano* Does Not Address Judicial Review Under the Circumstances Here, And Cannot Foreclose It.

Importantly, *Califano* does not hold that judicial review under Section 405 is only available for decisions on the merits made after a hearing on the merits, and unavailable in all circumstances for procedural dismissals of a Section 405(b) Hearing before the merits are fully adjudicated.

In *Califano* this Court held that judicial review of an administrative decision to deny reopening of a social security benefits claim was unavailable under Section 405(g); this because the Respondent Secretary could deny a petition to reopen a benefits determination under the applicable regulations without holding a hearing on the matter, i.e., "a petition to reopen a prior final decision may be denied without a hearing as provided in § 205(b) [42 U.S.C. 405(b)]". 430 U.S. at 108. Because an "interpretation that would allow a claimant judicial review simply by filing - and being denied - a petition to reopen his claim would frustrate the congressional purpose [in setting a sixty day time limit to seek review of an adverse initial benefits decision]", 430 U.S. at 108, this Court was persuaded that judicial review of a denial of a petition to reopen should not be permitted under Section 405(g).

Under *Califano* the availability of Section 405(g) judicial review thus turns first on whether the decision to be reviewed was made after an initial benefits

hearing, i.e., a "Section 405(b) Hearing", and not merely on whether the decision was procedural. Importantly, *Califano* also turned on the Court's concern with the unique nature of petitions to reopen (i.e., they seek to give a claimant the proverbial "second bite at the apple" after such claimant has already had a full opportunity for a hearing under Section 405(b), and on the attendant risk that allowance of judicial review of decisions denying such petitions would create a simple path for evading Section 405(g)'s sixty-day limitation on judicial review of initial benefit decisions. Such risks, of course, are not attendant on circumstances (such as those here) which do not involve a petition for reopening, and where no "second bite" is sought.

And because *Califano* did not involve circumstances (such as those here) where a Section 405(b) Hearing was dismissed on procedural grounds after its commencement, and continuation, but before the ALJ reached the merits of the subject benefits claim, it also does **not** expressly or implicitly address whether such dismissal constitutes a "final" decision of the Secretary "after a hearing" for Section 405(g) purposes. It only acknowledges that judicial review under Section 405(g) is intended to relate to decisions respecting an initial Section 405(b) Hearing, and not those respecting an attempted rehearing.

Since the Original Hearing (and its continuation, the November Hearing) were Section 405(b) Hearings (and did not relate to reopening), and since the Dismissal Order was entered after several hearing sessions were conducted (including the Impromptu

Hearing[6]) before the ALJ ever reached the issue of benefits, the Dismissal Order is properly considered a "decision" of the Secretary "after a hearing" for the purposes of Section 405(g), as interpreted by *Califano*. But since *Califano* does not address the other prong necessary in the Section 405(g) analysis, i.e., whether the Dismissal Order is a "final" decision of the Secretary under these circumstances, it cannot (and does not) offer any justification for the Opinion's denial of judicial review here. The 10th Circuit has, indeed, erred in trying to stretch *Califano* beyond its actual scope (i.e., to try to address the "finality" of the Dismissal Order under the circumstances here, when *Califano* does not address "finality" outside the narrow context of petitions to reopen).

That stretch under the circumstances flies in the face of the two-element analysis provided by *Mathews* and *Weinberger*, *supra*. The 10th Circuit's "analysis" has improperly reduced proper analysis of the availability of judicial review under Section 405(g) to a simple question of whether the decision to be reviewed is "procedural" or "on the merits"; criteria unaddressed by *Califano*. The Opinion thus misapplies *Califano* and creates significant conflict with other important opinions of this Court, *Mathews* and *Weinberger*, on the nature, scope and availability of judicial review under Section 405(g). This Court's intervention, and reversal of the Opinion, with remand to the district court to proceed with the review sought by the Estate, are

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[6] See footnote 7, *infra*, regarding the Opinion's mischaracterization of the Impromptu Hearing as a mere "conversation".

warranted by such misapplication in the 10th Circuit and such crucial conflict.

b. Although *Brandyburg* Mistakenly Applies *Califano* To Its Facts, It Does Recognize That Judicial Review Under Section 405(g) Is Appropriate Under the Circumstances Here and Thus Offers No Support for the Opinion.

In *Brandyburg* the 5th Circuit relied on *Califano* to deny Section 405(g) judicial review of a dismissal by an ALJ of a claimant's hearing request. That claimant failed to appear for a scheduled Section 405(b) Hearing, and no hearing was ever held. The 5th Circuit held that the Secretary's determination of lack of good cause for nonappearance under the circumstances, and subsequent dismissal, were not judicially reviewable under the circumstances presented there, interpreting *Califano* to preclude judicial review of the decision at issue as a discretionary decision of the Secretary rather than one made mandatory under the statute.

The 5th Circuit nevertheless recognized that the issue of which administrative decisions are "mandatory" and which are "discretionary" for the purposes of Section 405(g) is not to be interpreted narrowly. It stated with respect to judicial review of determinations to dismiss for nonappearance that:

> Unlike a request to reopen a prior final decision, where both the relief sought by the claimant and the grant of a hearing were

> discretionary, here the claimant's request is to have his hearing before the ALJ, and that right *is* conferred by statute. *See* 42 U.S.C. § 405(b)(1). Therefore we must also inquire whether the practice of pre-hearing dismissals violates the statute. Section 405(b)(1) guarantees any individual against whom an unfavorable determination of disability has been made "reasonable notice and *opportunity* for a hearing." (emphasis added).

Brandyburg, 959 F.2d at 560. The 5th Circuit thus recognized that decisions which improperly abridge the right to a Section 405(b) Hearing, a hearing made mandatory by statute, are subject to judicial review.

More particularly, the *Brandyburg* Court was concerned that "the danger that holding pre-hearing dismissals to be unreviewable **might create a situation in which an ALJ could insulate his own arbitrary denials of hearings from scrutiny and thus undermine even the statutory right to a reasonable opportunity for a hearing**." *Id.* (emphasis added). It acknowledged, although the circumstances before it did not so qualify in its opinion, that judicial review under Section 405(g) would be proper in circumstances where an ALJ dismissal decision threatened to undermine such statutory guaranty, for example, where the ALJ dismissed in a situation not authorized by the regulations (e.g., where there was good cause for a nonappearance like a medical emergency). *Id.* at 561, and n.8.

Brandyburg's recognition that judicial review is available under Section 405(g) to protect the statutorily

mandated opportunity for a Section 405(b) Hearing is consistent with the Estate's understanding of *Califano*, discussed in Section V.A.3.a, above; i.e., that a "decision" of the Secretary for the purposes of Section 405(g) is one respecting a Section 405(b) Hearing, and should not turn on whether the decision is purely procedural or on the merits. *Brandyburg* erred, however, in then failing to complete the proper analysis. Having recognized that the decision at issue before it was one respecting the mandatory right to an opportunity for an initial Section 405(b) Hearing, it should then have determined the availability of judicial review under the *Mathews/Weinberger* two-element test. The apparent reason for *Brandyburg's* erroneous deviation from this analysis is the 5th Circuit's concern that the literal language of Section 405(g) requires that a decision result from an actual hearing proceeding in order to be eligible for judicial review, 959 F.2d at 561, and there was none there. This concern is unwarranted in light of the *Mathews/Weinberger* two-element test, and fights *Brandyburg's* correct recognition that an ALJ decision which interferes with the right to an opportunity for a Section 405(b) Hearing is the kind of decision which is eligible (if final) for judicial review under Section 405(g).

It was, accordingly, improper for the 10th Circuit to rely on the erroneous elements of *Brandyburg* to determine that the Dismissal Order here was not judicially reviewable because it was merely "procedural". But, even under *Brandyburg's* flawed analysis, judicial review would properly be available here. The 5th Circuit expressly carved out an exception to its denial of judicial review in circumstances where the decision to be reviewed arose from a claimant's

attempt to demonstrate good cause for nonappearance as a result of an unavoidable difficulty such as a medical emergency, 959 F.2d at 561 and n.8. It noted expressly that Mr. *Brandyburg* did not attempt to raise such an argument, but sought review on the mere basis that the ALJ acted arbitrarily and capriciously in dismissing the hearing. *Id.* That difference in circumstances, alone, left the 10th Circuit's reliance on *Brandyburg* unjustified, and warranted remand of the Dismissal Order to the district court for judicial review. Moreover, unlike *Brandyburg* a Section 405(b) Hearing had been commenced here, and multiple sessions thereof were conducted prior to entry of the Dismissal Order.

Thus in the circumstances here, where the Estate seeks review of an ALJ dismissal entered after multiple sessions of a Section 405(b) Hearing, exhaustion of administrative review, and despite a showing of medical good cause for the Estate's nonappearance at the November Hearing, neither *Califano* nor *Brandyburg* pose an impediment to judicial review under Section 405(g). The 10th Circuit's application of those cases to foreclose such review was improper and conflicts with the clear import of both of them, and also conflicts with the *Mathews* and *Weinberger* two-element test on an important issue of federal law, i.e., the scope of judicial review under Section 405(g). This Court's review to resolve that conflict, reverse the Opinion, and remand to the district court to complete the judicial review sought by the Estate, is warranted.

4. This Court Should Further Clarify the Scope and Availability of Judicial Review Under Section 405(g).

It crucial for this Court to now resolve the conflicts the Opinion creates with the decisions of this Court, with *Brandyburg*, and with the district courts cases, like those cited above, which have applied the two-element analysis of *Mathews* and *Weinberger* in analogous circumstances, and to thus clarify the scope of judicial review under Section 405(g). There is significant risk that justice for Medicare claimants will be materially sacrificed by ALJs who succumb to pressures to give short shrift to cases, ostensibly on "procedural" grounds, when they know (or may be inclined to presume) they will not be held accountable by the federal judiciary.

B. The Opinion Denies Judicial Review of Colorable Constitutional Claims Arising in Medicare and Social Security Proceedings on Bases That Conflict with Prior Decisions of this Court.

Aside from whether judicial review is available under the specific terms of Section 405(g), *Califano* recognizes, citing *Mathews* and *Weinberger*, "the well-established principle that when constitutional questions are in issue, the availability of judicial review is ***presumed***." *Califano*, 430 U.S. at 109 (emphasis added). The Estate's Amended Complaint in the district court challenged the Impromptu Hearing, and the remainder of the process by which the ALJ decided to enter the Dismissal Order, as a denial of procedural due process. Amended Complaint at 23 (App. at pgs.

89a thru 90a). The allegations of the Amended Complaint in this regard were sufficient to meet notice pleading requirements. *See e.g.*, Fed.R.Civ.P. 8 (requiring only a short and plain statement of the claim showing entitlement to relief). The district court dismissed the case on purported failure to exhaust administrative remedies, but did not mention the constitutional claims alleged in the Estate's pleadings.

With regard to the Estate's demonstration that the district court erred by not permitting judicial review to address the constitutional claim, the Opinion, at pgs. 12-14 (App. at pgs. 10a thru 11a), held that the Estate did not assert a colorable constitutional claim because (i) its Amended Complaint purportedly did not allege facts which could demonstrate a constitutional violation, (ii) the Estate did not cite any authority which establishes that it had a constitutional right to a hearing on the request for continuance, and (iii) the Estate did not identify a property interest that it was deprived of when the ALJ "did not hold a hearing on its request for continuance". The Opinion adds that the Impromptu Hearing was not actually a hearing, but a mere conversation between the Physician and the ALJ. Opinion at pg. 10 (App. at pg. 8a). Unfortunately, the Opinion disingenuously ignores the well established requirement of this Court that procedural due process under the Fifth Amendment to the United States Constitution be satisfied before social security or Medicare benefits are terminated or denied, including the need for **meaningful** opportunities to be heard with respect to such termination or denial, (meaningfulness being determined in light of the circumstances of the case). *Mathews*, 424 U.S. at 333, 334.

1. The Amended Complaint Clearly Alleges Constitutional Violations, And Thus Judicial Review of the Dismissal Order and Review Denial Are Available Under Califano, Mathews and Weinberger.

At ¶¶2-19 the Amended Complaint recites pertinent history of the administrative proceedings below, notably including, at ¶¶11-19, the circumstances of the Impromptu Hearing procedure, and dismissal of the Hearing Request (including incorporation of the Dismissal Order). App. at pgs. 82a thru 91a. At ¶23 of the Amended Complaint, the Estate alleges that the **entire course of proceedings** pursuant to which the Dismissal Order was entered violated the Estate's procedural due process rights under the 5th Amendment, including rights to proper and timely notice and hearing with respect not only to the Dismissal Order, but also with respect to review of the underlying agency decisions since that dismissal was unwarranted.

Although the Amended Complaint would not, under notice pleading requirements, include argument or legal citations demonstrating that the entire course of such proceedings violated the Estate's due process rights, such authorities were cited, and arguments elaborated, in the Estate's briefs before both the district court and 10th Circuit.

Notably, *Mathews*, 424 U.S. at 333 (1976), readily establishes that due process requires an opportunity for benefit claimants to be heard at a meaningful time and in a meaningful manner respecting deprivation of claimed benefits. Because the Hearing Request was

dismissed as a result of the Impromptu Hearing mechanism, and the Estate was thereby denied rights regarding its entitlement to claimed benefits, *Mathews* clearly indicates that such mechanism was subject to due process requirements. While *Mathews* also holds that what is "meaningful" in a given case may vary with case circumstances, 424 U.S. at 334, there is abundant case authority outlining what would be needed for a **meaningful** opportunity here for the Estate to have been heard respecting the requested continuance and good cause for the "nonappearance" at the November Hearing.

In this regard *Allison v. Heckler,* 711 F.2d 145, 146-47 (10th Cir. 1983), held that due process in a benefits hearing was violated by ALJ reliance on a post-hearing expert report without affording the claimant the right to cross examine the expert and provide rebuttal evidence on the additional new evidence. T*ownley v. Heckler,* 748 F.2d 109, 114 (2d Cir. 1984), held that due process was violated where the ALJ decided a benefits matter in partial reliance on evidence not adduced at hearing and the claimant was not afforded the opportunity to see such additional evidence, cross examine on it, or rebut it. *Abdulai v. Ashcroft,* 239 F.3d 542, 549 (3rd Cir. 2001), held that in the administrative adjudicative context, a claimant must be allowed to make arguments on his or her own behalf before the decision maker, citing *De La Llana-Castellon v INS*, 16 F.3d 1093, 1096 (10th Cir. 1994)). Additionally, *De La Llana-Castellon* held, at 16 F.3d at 1096, that in the adjudicative context, due process entitles a person to factfinding based on **a record** produced before the decision maker and **disclosed** to that person.

Here the record reflects a deprivation of a meaningful opportunity to be heard on the continuance requested perforce of Lego's illness, and on the ensuing dismissal of the Hearing Request. Among other things, the ALJ wasn't even disposed, initially, to consider medical evidence on Lego's reported **medical** condition. Amended Complaint at ¶14. He did not permit Lego to orally address the request for a continuance or any anticipated dismissal, or any of the evidence gleaned from the ALJ's ex parte fact-gathering from Dr. Capek, although according to the Dismissal Order the representatives for Porter were permitted to testify with respect to the requested continuance without an opportunity (given his illness) for reply by Lego. App. at pg. 20a. Lego was not allowed to examine the only medical witness on the issue respecting the need for a continuance, Dr. Capek, nor was Lego even permitted to participate via phone when the ALJ spoke[7] to Dr.

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[7] Although the Opinion, App. at pg. 8a, claims that this "conversation" was not a "hearing", it was in all respects the functional equivalent. The term "hearing" in the context of the continuance request is not defined in Section 405(g). However, the term "hearing" is commonly understood to mean "whatever takes place before magistrates clothed with judicial functions and sitting without a jury at any stage of the proceedings subsequent to its inception. . ." *Black's Law Dictionary* (4th Ed. Rev.) at pg. 852. This definition certainly matches the Impromptu Hearing which may have lacked the formality of most hearings, but bore all the functional earmarks of one nevertheless. The purpose of the Physician/ALJ conversation was to allow the ALJ to gather **evidence** from the Physician on the Estate's request for a continuance and to make a decision on that request based, at least in part, on such **evidence**. As noted above, the ALJ informed the Physician that a decision would be forthcoming on the continuance request before 5:00 pm on the day of the Impromptu Hearing, and the ALJ relied on the Physician's statements in both denying a

Capek and thereby gathered additional evidence upon which he based denial of the requested continuance and the Dismissal Order. Amended Complaint at ¶14. And there is, importantly, no record of that discussion.

It is obvious from the Dismissal Order that, as predicated by the Impromptu Hearing maneuver, the ALJ was substantively wrong on the medical work restrictions which figured prominently in the dismissal.[8] The ALJ's failure to advise Lego on Friday, November 19, 2004 of his decision on the requested continuance, as assured, indirectly, through Dr. Capek, also deprived Lego of an adequate opportunity to take other steps protective of his client's rights and interests. The Impromptu Hearing mechanism, because it did not contemplate or provide for recording of cogent medical testimony, also openly and indifferently deprived the Estate of a sufficient appellate record to bring before the DAB.

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continuance of the November Hearing and in dismissing the Hearing Request.

[8] As mentioned in the Statement of the Case, *supra*, the ALJ seriously misapprehended the nature of the work restrictions imposed on Lego by the Physician in the four weeks preceding the November Hearing. Although Lego's forty hour per week work restrictions were cut to twenty hours by the Physician, beginning four weeks before the November Hearing, the ALJ found that Lego was only restricted to a forty hour work week during the time between the scheduling of the November Hearing and its occurrence. This crucial error undermines the key premise of the Dismissal Order that Lego could have prepared for and attended the November Hearing, even apart from the ALJ's total disregard of Lego's bronchial infection at the time of that hearing and in the weeks immediately preceding it.

A meaningful opportunity to be heard under the circumstances, as required by *Mathews*, *supra*, included, per *Allison*, *supra*, *Townley supra*, *De La Llana-Castellon*, *supra*, and *Abdulai*, *supra*, requirements that Lego (i) be present when the ALJ spoke to Dr. Capek and be afforded the opportunity to hear the evidence he provided, ask questions, and/or rebut his testimony, (ii) be permitted to argue before the ALJ based on the evidence and respond to the input of Porter representatives, and (iii) be provided a record of what was said to the ALJ. The foregoing circumstances indicate it was afforded no such opportunity. And as a result of these infirmities in the Impromptu Hearing mechanism, dismissal was granted based on significant substantive errors in the Dismissal Order, including *inter alia* the key ALJ misunderstanding that Lego could work twice as many hours to prep for the November Hearing as his doctor actually then permitted (see footnote 8, *supra*), and the key ALJ misunderstanding that the case had been at issue for four years, when in fact it had been at issue for less than three at the time of the November Hearing. App. at pg. 16a.

The procedure so indulged by the ALJ in orchestrating and conducting the Impromptu Hearing (including his allowance of Porter representatives to address the continuance request without an opportunity for Lego to reply) sharply failed to afford due process to the Estate with respect to the requested continuance and related dismissal. Under *Califano*, *Mathews* and *Weinberger*, *supra*, that failure provided the district court with subject matter jurisdiction over the Estate's constitutional claims in that case. The

Opinion's contention that the Amended Complaint did not allege facts which could demonstrate a constitutional violation is simply contrary to both *Mathews*, and to the Circuit Court opinions cited above.

2. It Was Unnecessary for the Estate to Show That It Was Entitled to a Separate, Formal Hearing on the Emergency Motion Under the Circumstances in Order to State a Colorable Constitutional Claim.

The Opinion also rejects the Estate's position that a colorable constitutional claim was raised in objecting to the Impromptu Hearing procedure because the Estate did not cite any case authority holding that it was entitled to a formal hearing on a requested continuance. However, the constitutional violation alleged is not based merely on a particularized right to a particular hearing, as indicated by the 10th Circuit's statement, but on the fact that the overall procedure by which the ALJ entered the Dismissal Order (including deficiencies in the Impromptu Hearing process by which the requested continuance was denied) violated the right found in *Mathews* to an **opportunity** to be heard at a **meaningful** time and in a **meaningful** manner in administrative hearings impacting governmental benefit entitlements.

In this regard it is undisputed that the Estate has a right to an ALJ review of the underlying agency decisions at issue in this proceeding. 42 C.F.R. §422.600. An ALJ is empowered to truncate that right by dismissal of a request for hearing *only under limited circumstances*. 20 C.F.R. §404.957. One of those

circumstances is non-appearance at a scheduled hearing, but then *only when the claimant has not shown good cause for the non-appearance.* 20 C.F.R. §404.957(b). Thus, an ALJ's good cause determination can adversely impact a claimant's rights to Social Security or Medicare benefits. Per *Mathews, supra,* due process rights accompany determinations impacting the right to such benefits. Accordingly, the Estate's constitutional claim is properly based on *Mathews* because the procedure employed by the ALJ did not afford a ***Mathews*-compliant opportunity** to obtain substantive ALJ review of agency decisions denying the Estate's rights to claimed Medicare benefits.

It is properly based, as well, on a significant number of cases addressing specific constitutional infirmities in analogous situations. See authorities cited *supra* at pgs. 16. Thus, to the extent that the Opinion turned on the absence of a citation to a "constitutionally protected right" to have a **particular** hearing on the Estate's requested continuance, it misapprehends or overlooks both the Estate's pleading and position, and applicable legal principles.

Importantly, it was the ALJ who initially determined that he **would not hear from Lego individually in any manner** on the requested continuance, and who largely limited the Estate's input on the matter to a private telephone discussion with the Physician on medical matters, a discussion not recorded or transcribed. Under this ALJ-initiated procedure, Lego was deprived of the fundamental ability to meaningfully present his side of the matter to the ALJ, a deprivation not cured by his submission of the

Emergency Motion, because (*inter alia*) in preparing that motion he was not privy to the details[9] of the discussion between the ALJ and the Physician and, thus, was prevented from meaningfully addressing in that Motion the contents of secret or guarded evidence (or from meaningfully addressing the absence of relevant evidence in the private telephone discussion). Additionally, the ALJ's failure to advise Lego by 5:00 p.m. on Friday, November 19, 2004 of his ruling, per his reported representations to the Physician during those discussions, prejudiced the Estate; it had no time to obtain substitute counsel to appear live at the November Hearing. And, the ALJ's reliance on those private discussions in so entering the Dismissal Order, without recording them or making a verbatim transcript of them, prevented consideration of all the evidence underlying the Dismissal Order when the Estate brought its internal agency appeal of that Order to the DAB.

These circumstances well bespeak a deprivation of an **opportunity** for the Estate to be heard on (i) its request for continuance and (ii) the Hearing Request, in a meaningful manner and at a meaningful time under the circumstances, in direct violation of *Mathews* and its progeny. The 10th Circuit's focus on the absence of specific authority providing a constitutional right to a **formal hearing** before the ALJ solely on a continuance request, improperly sidesteps the flexible analysis of meaningfulness under case circumstances required by

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[9] The Physician's report to Lego of his telephone discussion with the ALJ was a mere overview of principal recollections, not the sort of nuanced detail essential for fact-based legal argument.

Mathews, and places the Opinion in palpable conflict with key authority from this Court.

3. The Estate Manifestly Identified The Property Interest of Which It Was Deprived.

The 10th Circuit claims the Estate did not identify a property interest of which it was deprived when the ALJ "did not hold a hearing on its request for continuance." It is abundantly clear in real context that the property interest impacted by the ALJ's anomalous procedures was nothing less than the right to receive the subject Medicare benefits. Amended Complaint at ¶¶6-9 and ¶23. It is undisputed that Porter is seeking payment from the Estate of a bill it claims is outstanding as a result of the denial of the subject Medicare+Choice benefits.

Mathews, 424 U.S. at 334, as well as its cited progeny recognize that the claim of entitlement to such benefits provides a sufficient property interest to warrant due process protection to claimants seeking them administratively. That protection includes an opportunity to be heard in a meaningful manner and at a meaningful time on matters affecting such benefits, and the denial of that opportunity is a key basis of the Estate's constitutional claim. The 10th Circuit's apparent requirement that something different be alleged to state a colorable constitutional claim under the circumstances places it in further conflict with the clear import of *Mathews* and its progeny; a claim of entitlement to social security or Medicare benefits provides a sufficient property interest to require that proceedings related to determination of such claims properly afford due process.

4. The 10th Circuit's Treatment of the Estate's Due Process Claim Manifestly Disregards Mathews Under the Circumstances, and Warrants This Court's Review.

Mathews' due process analysis focuses significantly on an opportunity to be heard meaningfully in matters affecting determination of rights to social security and Medicare benefits. The analysis of whether such an opportunity is afforded in a case must inherently be subject to some flexibility based on case circumstances. Given that the Amended Complaint here clearly alleges a lack of a meaningful opportunity for the Estate to be heard on the requested continuance and dismissal, the Opinion's treatment of the Estate's claim in that regard manifestly sidesteps the meaningfulness requirement of *Mathews* and the inherent flex needed in assessing it. Review of the Opinion, its reversal and remand to the district court for judicial review based on the Estate's claim of a constitutional violation are patently warranted and now appropriate.

CONCLUSION

WHEREFORE, compelling reasons for this Court's review of the Opinion on a writ of certiorari having been shown, this Petition should be granted.

RESPECTFULLY SUBMITTED,

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(any footnotes trail end of each document)

No. 06-1498
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ESTATE OF BERNADETTE F. LEGO,
Plaintiff-Appellant,

v.

MICHAEL O. LEAVITT, Secretary of the Department of Health and Human Services,
Defendant-Appellee.

August 2, 2007, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For ESTATE OF BERNADETTE F. LEGO, Plaintiff-Appellant: Robert T. Lego, Lego Law Firm, Englewood, CO.

For MICHAEL O. LEAVITT, Secretary of the Department of Health and Human Services, Defendant-Appellee: Terry Fox, Office of the United States Attorney, Denver, CO.

JUDGES: Before TACHA, Chief Judge, MURPHY and HOLMES, Circuit Judges.

OPINION BY: Michael R. Murphy

OPINION

ORDER AND JUDGMENT *

The Estate of Bernadette Lego ("the Estate") appeals from the district court's decision granting the motion to dismiss filed by Michael O. Leavitt, Secretary of the Department of Health and Human Services ("the Secretary"), and dismissing the Estate's complaint for lack of subject matter jurisdiction. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Background

In August 2001, Bernadette Lego, a recipient of Medicare Part C benefits, was admitted to Porter Adventist Hospital in Denver, Colorado. At the end of September, Mr. Robert Lego, an attorney and Mrs. Lego's husband, received notice that if Mrs. Lego continued her stay at Porter, she would no longer be covered by Medicare and would be responsible for payment of all costs of services. This determination was based on the Medicare review program's assessment that acute hospital care was no longer medically necessary. Mr. Lego sought reconsideration of the decision and it was denied. Mrs. Lego remained at Porter until November 9. In December, Mr. Lego timely requested a hearing before an Administrative Law Judge (ALJ) to review the denial of coverage. After Mrs. Lego's death in June 2002, Mr. Lego continued the administrative appeal on behalf of the Estate.

On May 30, 2003, Mr. Lego appeared at a hearing. The ALJ's decision reflects that "Mr. Lego testified that he

did not know why a hearing was being held as it was his understanding that there was a zero balance on the account [*3] and that no collection actions had been undertaken." Aplt. App. at 21. The ALJ adjourned the hearing to contact the provider, Centura Health, in order to clarify the matter. *Id.* The ALJ learned that there was an outstanding amount in excess of $ 144,000 and that it was an active collection account. *Id.*

After the ALJ obtained this clarification, the ALJ's staff contacted Mr. Lego to reschedule the hearing. In September 2004, another hearing was scheduled for November 22, 2004. Mr. Lego contacted the ALJ's office by telephone on November 19 to inform them that he was ill and requested a continuance of the hearing. After Mr. Lego's phone call, the ALJ indicated that he would not consider a continuance unless he could speak with Mr. Lego's physician regarding Mr. Lego's medical condition. The ALJ did speak with Mr. Lego's physician, although Mr. Lego was not permitted to participate in the phone call.

On the day of the hearing, November 22, Mr. Lego filed an "Emergency Motion to Continue Hearing and for Expedited Determination of Such Continuance." Representatives for Centura Health appeared at the hearing and opposed the motion for a continuance. Mr. Lego did not appear. On December 29, [*4] the ALJ issued a decision denying the request for a continuance and determining that "good cause" did not exist for Mr. Lego's failure to appear at the hearing. *Id.* at 23. Because Mr. Lego had not established good cause for not appearing at the hearing, the ALJ dismissed the request for a hearing, which left the earlier determination of non-coverage in effect.

Mr. Lego sought review of the ALJ's decision through the Medicare Appeals Council (MAC). In May 2005, the MAC denied the request, concluding that there was no legal basis to review the ALJ's decision. In July 2005, Mr. Lego filed a complaint in district court on behalf of the Estate seeking judicial review of the ALJ's decision. The Secretary filed a motion to dismiss, arguing that the district court lacked subject matter jurisdiction over the Estate's complaint. The district court granted the motion and dismissed the case. The Estate appealed.

Discussion

The Estate asserts that the district court erred by (1) failing to provide factual findings and conclusions of law in violation of Fed. R. Civ. P. 52 when the district court entered the order dismissing the complaint; and (2) granting the Secretary's motion to dismiss for lack [*5] of subject matter jurisdiction. We review de novo the district court's dismissal of the Estate's complaint for lack of subject matter jurisdiction. *See Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1202 (10th Cir. 1998).

Rule 52

The Estate argues that the district court violated Rule 52(a) by not providing factual findings and conclusions of law when the district court entered its order granting the Secretary's Fed. R. Civ. P. 12(b)(1) motion to dismiss. The Estate, however, provides an incomplete citation to Rule 52 thereby misrepresenting the scope of the rule. In its brief, it states, "Fed. R. Civ. P. 52(a) provides that a court 'shall find the facts

specially and state separately its conclusions of law thereon . . . .'" Aplt. Br. at 14. The Estate neglects to include in this excerpt an important and highly relevant portion of the rule, which states: "Findings of fact and conclusions of law *are unnecessary on decisions of motions under Rule 12* or 56 or any other motion except as provided in subdivision (c) of this rule." Fed. R. Civ. P. 52(a) (emphasis added). Subdivision (c) does not apply here because it relates to proceedings involving a trial without a jury. *See* Fed. R. Civ. P. 52(c). [*6] The district court was therefore not required by Rule 52 to provide findings of fact and conclusions of law when it granted the Secretary's 12(b)(1) motion to dismiss.

Moreover, we find the district court's order sufficient to enable us to conduct our appellate review. In the Secretary's motion to dismiss, he argued that the district court lacked subject matter jurisdiction because there was no final decision after a hearing as required by 42 U.S.C. § 405(g) and that the Estate had not alleged a colorable constitutional claim such that the Estate's failure to exhaust its administrative remedies should be excused. In the order, the district court granted the motion to dismiss and then stated: "This case is DISMISSED for lack of subject matter jurisdiction. Plaintiff failed to exhaust all administrative remedies." Aplt. App. at 126. Given that the district court granted the motion to dismiss and dismissed the case on the basis argued for by the Secretary in his motion, there was no need for further discussion by the district court to enable this court to review the order.

Jurisdiction

The Estate argues that the district court erred in dismissing its complaint for lack of subject matter [*7] jurisdiction because its complaint falls within the judicial review language of 42 U.S.C. § 405(g). Section 405(g) is applicable to the review of benefit decisions on Medicare+Choice Plans, substituting the Secretary for the Commissioner of the Social Security Administration where § 405(g) refers to the Commissioner. *See* 42 U.S.C. § 1395w-22(g)(5). The provision states in relevant part: "Any individual, after any final decision of the [Secretary] made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action . . . ." *Id.* § 405(g).

Here, the ALJ dismissed the Estate's request for a hearing based on 20 C.F.R. § 416.1457(b)(1). Under § 416.1457(b)(1)(i), an ALJ may dismiss a request for a hearing if: (1) neither the plaintiff nor their representative appears at the time and place set for the hearing; (2) the plaintiff has been notified before the time set for the hearing that the request for a hearing may be dismissed without further notice for failure to appear; and (3) good cause has not been found for the plaintiff's failure to appear. The ALJ concluded that the Estate had not demonstrated good cause for its failure to appear at the hearing. [*8] This left the earlier determination of non-coverage in effect and no hearing was held on the merits of the Estate's claim regarding the denial of Medicare benefits.

In *Califano v. Sanders*, the Supreme Court held that § 205(g) (later codified as § 405(g)) "clearly limits judicial review to a particular type of agency action, a 'final

decision of the Secretary made after a hearing.'" 430 U.S. 99, 108, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977) (quoting § 205(g)). Although *Califano* involved a different type of proceeding-a petition to reopen a prior final decision-the Fifth Circuit applied *Califano* to a case that is virtually identical to the case here. In *Brandyburg v. Sullivan*, 959 F.2d 555, 556-57 (5th Cir. 1992), the plaintiff requested a hearing with an ALJ after his application for supplemental security income disability benefits was denied initially and on reconsideration. His hearing was rescheduled twice. Five days before the hearing was scheduled to take place, plaintiff's attorney requested a continuance. Neither plaintiff nor his attorney appeared at the hearing. Subsequently, the ALJ entered an order dismissing the request for a hearing based on his finding that plaintiff had failed to appear at the hearing without [*9] good cause. Plaintiff sought review of the ALJ's dismissal, but the Appeals Council denied review. Plaintiff then filed an action in federal district court. Defendant filed a motion to dismiss, arguing that the court lacked jurisdiction because plaintiff had failed to exhaust his administrative remedies and there had been no final decision of the Secretary within the meaning of § 405(g). The district court granted the motion. The Fifth Circuit affirmed, noting that *Califano* explicitly held "that § 405(g) only authorizes judicial review when there is a hearing." *Id.* at 561. Moreover, the court went on to explain that it and other circuits had held that district courts lack jurisdiction to review other types of procedural dismissals under § 416.1457 and that a dismissal for failure to appear at a hearing should be treated the same way. *Id.* Accordingly, the Fifth Circuit held "that the district court was correct in its holding that the ALJ's dismissal

of [plaintiff's hearing] request was not a 'final decision' subject to judicial review under section 405(g)." *Id.* at 562.

Relying on the language of § 405(g) and the cases referenced above, the Secretary's position is that the district court [*10] correctly determined that it lacked jurisdiction over the Estate's complaint because "there was no final decision of the Secretary *after* a hearing." Aplee. Br. at 16. The Estate disagrees, arguing that its complaint falls within the judicial review language of § 405(g) because there were two hearings before the ALJ entered its dismissal-the impromptu telephone hearing with Mr. Lego's doctor and the November 22 hearing.

The ALJ's phone conversation with Mr. Lego's doctor was not a hearing. It was simply a conversation between the ALJ and Mr. Lego's doctor concerning Mr. Lego's alleged medical condition and the necessity for a continuance. As for the November 22 hearing, although Centura appeared for the hearing, Mr. Lego, the Estate's representative, did not appear. As in *Brandyburg*, there was no merits hearing that would fall within the meaning of § 405(g) and therefore the district court was correct in dismissing the complaint for lack of jurisdiction. Moreover, the ALJ's dismissal was a procedural one and, as the court noted in *Brandyburg*, district courts lack jurisdiction to review an ALJ's procedural dismissal under § 416.1457. *See Brandyburg*, 959 F.2d at 561-62. This provides [*11] an additional basis for affirming the district court's decision.

Finally, the Estate argues that even if *Califano* and its progeny in some measure support the district court's

dismissal for lack of jurisdiction, *Califano* provides an exception permitting federal courts to review constitutional challenges. In order to be entitled to jurisdiction under this exception, however, the Estate must allege a "colorable constitutional claim." *Califano*, 430 U.S. at 109; *see also Nelson v. Secretary of HHS*, 927 F.2d 1109, 1111 (10th Cir. 1990); *Brandyburg*, 959 F.2d at 562. "A constitutional claim is not colorable if it clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or [] is wholly insubstantial or frivolous." *Hoye v. Sullivan*, 985 F.2d 990, 991-92 (9th Cir. 1992) (per curiam) (quotation omitted).

The Estate's complaint contains the following allegation:

Plaintiff is also entitled to relief because the proceedings pursuant to which the Order was entered (including (i) the entire procedural history respecting the setting of a hearing before the ALJ, and (ii) the circumstances, beginning on November 19, 2004 with Lego's initial notification to [*12] the ALJ's office that his illness would prevent his attendance at the November Hearing, and culminating in the Order) denied Plaintiff its constitutional rights of due process, including rights to proper and timely notice and hearing with respect to review of both the First Review Decision and the Reconsideration Decision, with respect [to] the November Hearing, and also with respect to the Order. Aplt. App. at 12-13. Although the Estate made the conclusory allegation that it was "denied its constitutional rights of due process, including rights to proper and timely notice and hearing," *id.* at 13, it failed to allege facts to support

that allegation. For example, Mr. Lego has not alleged any violations of § 416.1457. He has not alleged (1) that he was present at the hearing; (2) that he did not receive notice of the consequences if he failed to appear; or (3) that the ALJ failed to make a good cause finding for his failure to appear. *See* § 416.1457(b)(1)(i).

With respect to any claim the Estate may have that the ALJ's consideration of its request for a continuance violated its due process rights, the Estate has not identified any authority that establishes that it had a constitutionally [*13] protected right to have a hearing on its request for a continuance. Relying on Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Estate argues that it was entitled to a hearing on the continuance where Mr. Lego was present when the ALJ spoke with his doctor, where Mr. Lego could argue before the ALJ based on the evidence, and where Mr. Lego could then receive a record of the proceedings. Although the Estate cites to *Mathews*, it provides no analysis as to how *Mathews* applies to the Estate's request for a continuance, other than to state that under *Mathews* "due process requires an opportunity to be heard at a meaningful time and in a meaningful manner." Aplt. Br. at 22; *see also id.* at 25. As the Secretary points out, however, in order for the Estate to benefit from the *Mathews* decision, it must establish that it "had a constitutionally protected *property interest* in having a full-blown hearing on the continuance request." Aplee. Br. at 23 (emphasis added); *see also* Mathews, 424 U.S. at 333 ("This Court has consistently held that some form of hearing is required before an individual is finally deprived of a *property interest*." (emphasis added)). There is nothing in the Estate's complaint, [*14] its response to the

motion to dismiss, or its appellate briefs that identifies the "property interest" that it was deprived of when the ALJ did not hold a hearing on its request for a continuance.

Given the lack of factual or legal support for the Estate's constitutional allegations, we conclude that it did not raise a colorable constitutional claim and that the district court's decision to dismiss the complaint for lack of subject matter jurisdiction was correct. Accordingly, the judgment of the district court is AFFIRMED.

Entered for the Court

Michael R. Murphy

Circuit Judge

---------- Footnotes ----------

*After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Judge John L. Kane

Civil Action No. 05-cv-1260-AP

ESTATE OF BERNADETTE F. LEGO, deceased,
Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of Social Security,
Defendant.

ORDER

Kane, J.

The Unopposed Motion to Accept Plaintiff's Response as Timely (doc. #22), filed September 11, 2006, is GRANTED. The response is accepted as timely filed. This matter is now before the court on Defendant's Motion to Dismiss Amended Complaint (doc. # 19), filed August 16, 2006. The court has considered the motion and the response. It is, therefore,

ORDERED that the motion is GRANTED. This case is DISMISSED for lack of subject matter jurisdiction. Plaintiff failed to exhaust all administrative remedies.

Dated this 12th day of September, 2006.

BY THE COURT:

s/John L. Kane
Senior Judge,
United States District Court

Department of Health & Human Services
Office of the Secretary
Departmental Appeals Board, MS 6127
Medicare Appeals Council
330 Independence Avenue
Cohen Building, Room G-644

May 5, 2005

HIC Number: 8288A

ACTION OF MEDICARE APPEALS COUNCIL ON REQUEST FOR REVIEW

Robert T. Lego, Esq. o/b/o
Bernadette Lego, Decd.
7887 E. Belleview Avenue, Suite 1100
Englewood, CO 80111

Dear Mr. Lego:

The Medicare Appeals Council has carefully considered the request for review of the Administrative Law Judge's (ALJ's) Order of Dismissal dated December 29, 2004. The case concerns coverage and payment by a Medicare+Choice (M+C) plan. Pacificare/Secure Horizons, for services furnished to beneficiary Bernadette Lego by Porter Adventist Hospital from October 10, 2001, through November 9, 2001.

The regulations provide that the Medicare Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the ALJ's action, findings, or conclusions are not supported by substantial evidence: or (4) there is a broad policy or procedural

issue that may affect the general public interest. The regulations also provide that if new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Council finds that the ALJ's action, findings, or conclusion is contrary to the weight of the evidence currently of record. See 20 C.F.R. Sec. 404.970, incorporated by reference in 42 C.F.R. Sec. 422.608.

The Medicare Appeals Council has considered the contentions received in connection with the request for review. The Council has concluded that there is no basis under the above regulations for granting the request for review. The Council finds that the ALJ's action is supported by substantial evidence, and is consistent with applicable law and regulations. Accordingly, the request for review is denied, and the reconsidered determination, dated October 22, 2001, stands as the final decision of the Secretary.

Sincerely yours,

s/Thomas E. Herrmann
Administrative Appeals Judge.

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

ORDER OF DISMISSAL

IN THE CASE OF:
BERNADETTE LEGO (Deceased)(Appellant)
BERNADETTE LEGO(Deceased)(Beneficiary)
Centura Health (Carrier/Intermediary/PRO)

CLAIM FOR: SUPPLEMENTAL MEDICAL INSURANCE BENEFITS(Part A)
xxx-xx-8288(HICN)
xxx-xx -8288(Docket Number)

This case is before the Administrative Law Judge on a timely filed Request for Hearing received on December 21, 2001. The parties in interest were provided a Third Notice of Hearing on September 23, 2004 advising them that a hearing would be held on November 22, 2004 before the undersigned.

This case has a long history of which the undersigned will take some time to set forth so the parties know the reason for the Order of Dismissal.

This case was first set for a hearing on May 30, 2003 pursuant to a Notice of Hearing dated May 7, 2003. Mr. Robert Lego, an attorney and spouse of the deceased appellant who substituted as the main party in interest, appeared. At that hearing Mr. Lego testified that he did not know why a hearing was being held as it was his understanding that there was a zero balance on the account and that no collection actions had been undertaken. In order to clarify this matter, the

undersigned adjourned the hearing to contact the provider, Centura Health, who verified that there was an outstanding amount in excess of $144,000.40 and representatives of Centura Health indicated that it was an active collection account.

After this clarification was obtained, the staff of the undersigned tried for over 12 months to reschedule this case. Mr. Lego most of the time indicated that he was not available for a hearing, sometimes imposing an objection of the order of the undersigned to have a medical expert testify at the hearing. Attempts to re-schedule the hearing were not successful as Mr. Lego was not available.

This hearing was finally rescheduled for July 21, 2004 which the undersigned had to vacate as he was traveling to Falls Church, VA to attend a management meeting.

The parties then agreed to have this hearing re-scheduled for November 22, 2004. Mr. Lego did not appear at the November 22, 2004 hearing. However, he did receive notice of the hearing as he filed a motion for continuance. Representatives of Century Health did show for the hearing. One day prior to the November 22, 2004 hearing, Mr. Lego called Sharon Williams, a Lead case technician, and requested a continuance. Mr. Lego indicated to Ms. Williams that he was ill and could not attend the hearing. The undersigned then indicated to Ms. Williams to call back Mr. Lego- and advise Mr. Lego that the undersigned would not consider a Motion for Continuance unless the undersigned talked to the claimant's treating doctor to, ascertain the reasons for Mr. Lego not being able to appear.

The undersigned did receive a call from Richard Capek, M.D., who identified himself as Mr. Lego's treating doctor. During the call, Dr. Capek was very vague about informing me of what was the illness of Mr. Lego that prevented him from working. Dr. Capek finally did state that the claimant had a bronchial infection but that his major problem was anxiety. Dr. Capek said that to prevent Mr. Lego's anxiety from becoming worse that he had limited Mr. Lego to not working more than 40 hours per week. The undersigned inquired of Dr. Capek how long those restrictions had be in place and he respond several months -- not being able to provide me an exact date as he did not have Mr. Lego's file in front of him.

Mr. Lego faxed in an unsigned Affidavit of Dr. Capek on the day of the hearing. Subsequently, a signed and notarized FAXED copy of Dr. Capek's Affidavit was faxed to the undersigned.

First of all, it should be noted that this case was scheduled in September 2004 for the November 22, 2004 hearing, At this time according to Dr. Capek's statement, the claimant's only work related restriction was not working more than 40 hours. Certainly, Mr. Lego could have prepared for this case within 40 hours per week since he had nearly three years to have become familiar with the narrow issue in this case. In addition, when the case technician contacted Mr. Lego in September, 2004 to schedule this case for November 22, 2004, Mr. Lego made no reference to having- any problems or work of work related restrictions that would prevent him from attending the hearing.
Second, the undersigned will assess. the statements and

Affidavit of Dr. Capek. Dr. Capek, in his conversation with the undersigned and in his Affidavit, admits that his specialty is internal medicine. Dr. Capek states that Mr. Lego was restricted to forty hours per week to control his anxiety which restriction worked well in controlling his symptoms. Paragraph 7 of Dr. Capek's Affidavit In Paragraph 10, Dr. Capek again imposed only a forty hour work restriction to control Mr. Lego's anxiety. Therefore, the undersigned concludes that Mr. Lego is able to function as an attorney efficiently and effectively within these restrictions.

Third, while Mr. Lego may have other litigation matter pending, when he agreed in September 2004 to the November 22, 2004 hearing, he would have sufficient time to prepare for this case and balance the case against his other time constraints due to pending litigation matters. In addition, since the facts of this case are highly familiar to Mr. Lego as he is the spouse of the deceased, Bernadette Lego, the demands of preparing for this case could have been accommodated within the forty hour work restriction given by Dr. Capek.

This case is four years old. The staff of the undersigned has attempted to get this case scheduled many times over the objections of Mr. Lego and the objections of Mr. Lego about the involvement of a medical expert. This last minute Motion to Continue under the argument that Mr. Lego could not have prepared or been available to pursue this case within his forty hour work restriction is nothing but a last minute attempt to further delay this proceeding which he initiated on his own by filing the Request for Hearing/Appeal.

The undersigned has determined that four years is enough time to pursue this matter. The undersigned has determined that no "good" cause exists, or existed, for the claimant not appearing on the day of the hearing. The undersigned finds that there is no good cause to grant the Motion for Continuance.

On the day of the hearing, representatives of Century Health, advised the undersigned that they had received a copy of the Motion for Continuance and they testified in opposition to the Motion. The undersigned informed Century Health, via findings on the record, of the information contained herein and the basis for the decision of the undersigned to dismiss the Request for Hearing.

Social Security Administration Regulation No. 16 provides that the Administrative Law Judge may dismissed a request for hearing when the claimant does not appear at the time and place set for the hearing and good cause for failure to appear is not found, if before the hearing the claimant was notified that the request for hearing could be dismissed without further notice for failure to appear (20 CFR § 416.1457(b)(I)).

Accordingly, the claimant has not established a good reason for failure to appear at the scheduled hearing.

Therefore, the request for hearing is hereby dismissed and the reconsideration determination remains in effect.

s/Patrick B. Augustine
U.S. Administrative Law Judge/Dec. 29 2004

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals
1244 Speer Boulevard
Suite 752
Denver, CO 80204
Date: Dec 29 2004.

Bernadette Lego -- Deceased
c/o Robert Lego, Esq.
7887 E. Belleview Avenue, Suite 1100
Englewood, CO 80111

NOTICE OF DISMISSAL

Enclosed is an. order of the Administrative Law Judge dismissing the Appellant's Request for Hearing, Please read this notice and the Order of Dismissal carefully:

If You Disagree With the Order of Dismissal

If you do not agree with the Administrative Law Judge's decision, you may file an appeal with the Medicare Appeals Council of the Department Appeals Board, DHHS.

How to File an Appeal

To file an appeal, you must request the Medicare Appeals Council to review the order of dismissal in writing. You may use our Request for Review form (HA-520) or write a letter. You may file a request at any local Social Security office or mail it to Department Appeals Board, Medicare Operations Division, DHHS, Hubert H. Humphrey Building. Room 633F, 200 Independence Ave. S.W., Washington, DC 20201.

Please include the Health Issuance Claim Number (HICN) (and Medicare Part B Docket Number, if applicable) shown above on any appeal you file, and a copy of the dismissal order.

Time to File an Appeal

If you wish to appeal the dismissal order, you must file your request for review within 60 days from the date you receive this notice. The Medicare Appeals Council will assume that you received the notice within five days after the date shown above unless you show you received it later. If you file a request for review after the 60-day period, the Medicare Appeals Council will dismiss the request unless you show you had a good reason for not filing it on time.

Time to Submit Any Additional Evidence

If you have any evidence you wish the Medicare Appeals Council to consider, you should submit it with your request for review.

Medicare Appeals Council Action On Your Appeal

The Medicare Appeals Council may deny or grant your request for review. The Medicare Appeals Council will vacate the order of dismissal only if good cause is established following the requirements of regulation 20 CFR § 404.960.

An Administrative Law Judge or the Medicare Appeals Council may vacate any dismissal of a hearing request if within 60 days after the date you receive the order of dismissal, you request that the dismissed be vacated

and show good cause why the hearing request should not have been dismissed. If the Medicare Appeals Council itself may decide within 60 days after the notice of dismissal is mailed to vacate the dismissal. The Medicare Appeals Council shall advise you in writing of any action it takes.

If No Appeal and No Review on the Medical Appeal Council's Own Motion

The Medicare Appeals Council may decide to review the decision on its own motion within 60 days of the date of this notice. If the Medicare Appeals Council does not review the decision on its own motion and you do not appeal the decision with the time permitted, you will. lose your right to ask a Federal court to review the decision. This decision will become a final decision that cannot be revised, at your request or our initiative, except in certain circumstances.

Your Right to Representation

You may appoint an attorney or other qualified person to represent you in any appeal you may file with the Medicare Appeals Council. Your local Social Security office has a list of groups that can help you find an attorney.

You may ask the provider or supplier who provided Medicare service to you to be your representative. Providers and suppliers of Medicare services may not charge a fee for representing you. Providers and suppliers must waive any right to payment from you with respect to the services involved in your appeal before serving as your representative.

Disclosure and Privacy Act Notice

Any identifying information (including the name, address, Health Insurance Claim Number (HICN) or any other personal identifiers) relating to the named beneficiary(ies) in this decision is protected from disclosure to anyone other the the appellant or the named beneficiary(ies) by the Social Security Act and the Privacy Act. Disclosure of such identifying information without the-express written consent of the named beneficiary(ies) is a violation of section 1106(a) of the Social Security Act, punishable by a $1,000 fine and/or one year imprisonment.

Do You Have Any Questions

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and dismissal order with you.

s/Patrick B. Augustine
U.S. Administrative Law Judge

COLORADO FOUNDATION FOR MEDICAL CARE

CONTINUED STAY REVIEW/NOTICE OF NON-COVERAGE
(DENIAL NOTICE UPHELD)

CONFIDENTIAL

Date: October 11, 2001
Patient: Bernadette Lego
Medicare: HIC# 8288A
Hospital: Porter Adventist Hospital
HMO#: HO609 Secure Horizons
Admission Date: 08/14/01
Case ID #: CO00031297
Attending Physician: David Taryle, M.D.

Dear Mr. Robert Lego:

The Colorado Foundation for Medical Care (CFMC) is the Peer Review Organization (PRO) authorized by the Medicare program to review inpatient hospital services provided to Medicare patients in the state of Colorado. By, law, we review Medicare cases to determine if the services meet medically acceptable standards of care, are medically necessary, and are delivered in the most appropriate setting.

On October 1, 2001, you requested an immediate review because you received, with the attending physician's concurrence, a notice of noncoverage from Secure Horizons on September 28, 2001 at 3:00 p.m. Our physicians have reviewed Mrs. Lego's admission of August 14, 2001 to Porter Adventist Hospital. We have determined that this admission was medically

necessary and appropriate. We agree, however, with the attending physician and the hospital that for the reasons specified below that the services your wife is currently receiving are not covered by Medicare because she no longer requires care in an acute care setting. Therefore, any inpatient hospital services received beginning October 10, 2001 after 12 noon will not be paid by Medicare.

Prior to reaching this decision, we considered the information provided through a telephone discussion with you on October 2, 2001 and any comments received from your wife's physicians, and the hospital.

After review of the medical record and the information provided, we determined that Secure Horizon's finding of non-coverage of services is appropriate and that your wife's continued stay is not medically necessary. The physician reviewer with a specialty in Oncology has responded with the following decision: "Mrs. Lego is a 68-year old female who was admitted to the hospital on August 14, 2001 with an intracranial malignancy. Although her care at this point is complicated by her tracheotomy, there is no indication that care cannot be provided safely and properly in either a long term care facility or hospice."

We notified you by telephone on October 9, 2001 of our determination that the services your wife is receiving are not covered by Medicare, and that if she decided to remain in the hospital after 12 noon on October 10, 2001, you would be responsible for payment of all costs of hospital services received after that time, except for those covered services which can be paid for by Medicare Part B. If Mrs. Lego decides to leave the

hospital prior to 12 noon on October 10, 2001, you will be responsible only for payment of any applicable amounts for deductible, coinsurance and convenience services and items normally not covered by Medicare.

We are also advising the attending physician and hospital of this denial. You should discuss other arrangements for any further health care that your wife may now require with her physician.

Upon receipt of this notice, you will continue to be responsible for payment for denied services occurring in the future which involve the same or reasonable comparable conditions. However, Medicare will pay for all medically necessary and appropriate hospital care that may be required in the future.

If you disagree with our determination and your wife remains in the hospital, you may request an expedited reconsideration by telephone or in writing. You may make this request through the hospital or to the, CFMC Medicare Review Programs at the address noted below.

CFMC will complete its reconsideration and send a written notice to you within three working days. However, if your wife is discharged from the hospital, you are still entitled to reconsideration. You must submit your request in writing within 60 days from the receipt of this notice to the CFMC Medicare Review Programs at the address below:

Colorado Foundation for Medical Care Medicare
Review Programs
P. 0. Box 17300 Denver, Colorado 80217

Or, you may make your request to:

1. Any Social Security Office. The Social Security Office can be located by consulting the U.S. Government listing in the telephone directory.

2. Any Railroad Retirement Office, if you are eligible.

U.S. Retirement Board P.O. Box 8869 Denver, Colorado 80201

Your request will be forwarded to CFMC.

As a result of our review, we may reaffirm or reverse our prior dental determination. If we reaffirm the denial determination, you will continue to be responsible for payment of services furnished as specified above. If we reverse the denial determination, you will be refunded any amount collected by the hospital except for payment of deductible, coinsurance, or any convenience services or items normally not covered by Medicare.

If you want help with your appeal of this denial determination, you can have a friend, lawyer, or someone else help you. Some lawyers do not charge unless you win your appeal. There are groups, such as lawyer referral services, that can help you find a lawyer. There are also groups, such as legal aid services, who will give you free legal services if you qualify.

You have the right to examine the complete medical

record (and other pertinent information) that we relied upon in making this denial determination. Although the hospital is the official repository of the medical records relevant to stays in the facility, should you wish to examine the records and other pertinent information for this particular stay, contact us in writing at:

CFMC Medical Records Department
P.O. Box 17300
Denver, Colorado 80217-0300

or by telephone: 1-800-727-7086 (statewide), or 695-3300 (Denver). There is no charge to examine the material at our office. You may also request a copy of the medical record and other pertinent information. We will, however, charge you a reasonable fee for photocopying and mailing this information.

You may wish to consult with your attending physician prior to taking any of the above actions.

CFMC has taken this action pursuant to Section 1154(a) of the Social Security Act and other Department of Health and Human Services regulations and guidelines.

Sincerely,
s/Will Schluter, MD, MSPH
CFMC Medical Director

COLORADO FOUNDATION FOR MEDICAL CARE

RECONSIDERATION NOTIFICATION
(CONTINUED STAY DENIAL NOTICE DECISION UPHELD)

CONFIDENTIAL

Date: October 22, 2001
Patient Name: Bernadette Lego
Address of Patient: 5 Cherrymore Drive
City,Suite, Zip Code: Cherry Hills Village, Colorado 80110
Medicare: HIC# 8288A
Hospital: Porter Adventist Hospital
HMO#: HO609 Secure Horizons
Admission Date: 08/14/01
Case ID #: CO00031297
Attending Physician: David Taryle, M.D.

Dear Mr. Robert Lego:

The Colorado Foundation for Medical Care (CFMC) is the Peer Review Organization (PRO) authorized by the Medicare program to review inpatient hospital services provided to Medicare patients in the state of Colorado. By law, we review Medicare cases to determine if the services meet medically acceptable standards of care, are medically necessary and are delivered In the most appropriate setting.

As a result of your request for reconsideration on October 10, 2001, we conducted a complete review of your wife's medical record and any additional information provided to us, to determine whether our

original denial determination was correct.

Your wife received, with her physician's concurrence, a notice of noncoverage from Secure Horizons on September 28th, and you requested that we review her hospital stay. A PRO physician reviewer determined that her admission of August 14, 2001, to Porter Adventist Hospital for care of an intracranial malignancy was medically necessary and appropriate. However, the physician reviewer agreed with your wife's physician and Secure Horizons that she no longer required acute care in a hospital setting because her condition, although complicated by a tracheostomy, could be safely and properly provided in either a long term care facility or hospice.

On October 9th, we notified you via telephone that we agreed with Secure Horizon's notice of noncoverage, and issued a denial determination. You were advised that if she decided to remain in the hospital after 12 noon on October 10th, you would be responsible for payment of all costs of denied services she received, except for those covered services which could be paid for by Medicare Part B.

The reconsideration was performed by a board-certified physician reviewer who specializes in pulmonary medicine. The physician reviewer, who was not involved in the original denial determination, performed a thorough re-examination of all the information contained in your wife's medical record and considered any additional information provided by her physician and/or the hospital.

The physician reviewer upheld the original denial

determination, because: your wife's condition is medically stable, and discharge to a facility that can handle tracheostomy care, implement aspiration precautions, and teach her how to inflate and deflate the tracheostomy cuff is appropriate. Therefore, we have determined that Medicare will not pay the hospital for the inpatient services she is receiving (except for those covered services which can be paid for by Medicare Part B) beginning October 10, 2001.

The physician reviewer also reconsidered the original liability determination that you knew that the denied services were not covered by Medicare. The physician reviewer determined that the original liability determination was correct. The hospital may send you a bill for services beginning October 10, 2001.

We are also advising the attending physician and the hospital of this reconsideration determination, which affirms our original denial determination. You should discuss with your wife's physician other arrangements for any further health care that she may now require.

Upon receipt of this notice you will continue to be responsible for payment of denied services occurring in the future which involve the same or reasonably comparable conditions. However, Medicare will pay for all medically necessary and appropriate hospital care she may require in the future.

If you disagree with our reconsideration determination, you may request a formal hearing before an administrative law judge (ALJ) of the Social Security Administration's (SSAs) Office of Hearings and Appeals (OHA) under the following conditions:

1. If Medicare has denied payment of $200 or more for services determined to be either not medically necessary or not provided at an appropriate level of care; or

2. If you do not appeal the denial of Medicare payment on the medical issues listed above and have been found liable for payment of at least $100 of the denied services, and you disagree with our liability determination that you knew or should have known that the denied services were not covered.

If you do not request an ALJ hearing regarding the liability determination, a dissatisfied provider or practitioner may request an ALJ hearing of that liability determination if they are liable for services of $100 or more.

If you wish to have an ALJ hearing, you must submit a written request within 60 calendar days of receipt of this notice. Your written request should include: your name, Medicare health insurance claim number, where and when services were received, the reason for your dissatisfaction with our determination, any additional evidence you might wish to submit, and a copy of this notice.

You, may send your written request to:

1. Any social security office;
2. An office of SSA's OHA
3. An office of the Railroad Retirement Board, if you are eligible; or
4. To us at the following address:

Colorado Foundation for Medical Care
Medicare Review Programs
P.O. Box 17300
Denver, Colorado 80217
303-695-3300 or 1-800-727-7086

If you want help with your appeal of this denial determination, you can have a friend, lawyer, or someone else help you. Some lawyers do not charge unless you win your appeal. There are groups, such as lawyer referral services, that can help you find a lawyer. There are also groups, such as legal aid services, who will give you free legal services if you qualify.

You have the right to examine the complete medical record (and other pertinent information) that we relied upon in making our initial denial and reconsideration determinations. Although the hospital is the official repository of the medical records relevant to stays in the facility, should you wish to examine the records and other pertinent information for this particular stay, contact us at the address or telephone number listed above. There is no charge to examine the material at our office. You may also request a copy of the medical record and other pertinent information. We will, however, charge you a reasonable fee for photocopying and mailing this information.

If you request a hearing, OHA will notify you of the date and place of the hearing. Hearings are held close to the address given on requests; therefore, if you request a hearing, please include the name of the county in which you reside along with your complete address and zip code. If you wish the hearing to he held somewhere

other than close to your residence, please note that on the hearing request.

The CFMC has taken this action pursuant to Section 1154(a) of the Social Security Act and other Department of Health and Human Services regulations and guidelines.

Due to 4 CFR 476.101 (b) and 133(a) (2) (iii), all letters are signed by the CFMC Medical Director in order to respect the confidentiality of the physician reviewer.

Sincerely,
Will Schluter, MD, MSPH
CFMC Medical Director

Filed 9/25/2007
No. 06-1498
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ESTATE OF BERNADETTE F. LEGO,
Plaintiff-Appellant,

v.

MICHAEL O. LEAVITT, Secretary of the Department of Health and Human Services,
Defendant-Appellee.

ORDER

JUDGES: Before TACHA, Chief Judge, MURPHY and HOLMES, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker, Clerk

EXHIBIT D

(to Response to Motion to Dismiss Amended Complaint)

EXHIBIT 1 TO REQUEST FOR HEARING BY ADMINISTRATIVE LAW JUDGE

I. BACKGROUND

The patient, Bernadette Frances Lego (the "Patient" or "Mrs. Lego"), is a sixty-eight year old woman who was originally diagnosed with a brain tumor in May of 2001. She is a subscriber to Secure Horizon's Medicare+Choice Plan which includes Medicare Part A coverage and promises her that medically necessary inpatient hospital services will be covered and provided to her.

Mrs. Lego was admitted to Porter Adventist Hospital, Englewood, Colorado ("Porter") on July 20, 2001 as a result of massive pulmonary emboli (blood clots) associated with her brain tumor and a suppressed immunity system resulting from continuing radiation and chemotherapy. She was discharged on August 4, 2001 and returned home.

On August 14, 2001 Mrs. Lego was readmitted to the intensive care unit (the "ICU") of Porter as a result of (grand mal and status elepticus) seizures, herpes encephalitis and pneumonia, among other tumor-related complications. Mrs. Lego required intubation and a ventilator for an extended period. A tracheostomy was performed on or about August 31, 2001 to avert vocal cord damage and permit her to breathe. As a result of swallowing impediments, Mrs.

Lego also received a gastric feeding tube the same day. She was transferred from ICU to a traditional acute care room at Porter where she underwent continuous treatment before discharge by her attending physician, Dr. David Taryle ("Taryle"), on November 9, 2001. The hospitalization of Mrs. Lego from August 14, 2001 through November 9, 2001 will hereinafter be referred to as the "subject hospital stay".

Mrs. Lego was under the treatment of 28 different doctors during the subject hospital stay. Throughout the subject hospital stay, and to date, however, the Patient's key physicians included: (i) Taryle, (ii) her primary care physician, Dr. Richard B. Capek ("Capek"), and (iii) her neuro oncologist, Dr. Edward Arenson ("Arenson").

II. THE DETERMINATION OF NON-COVERAGE

On September 28, 2001, while Mrs. Lego was receiving nursing care, four representatives of Secure Horizons abruptly entered Mrs. Lego's room and handed her husband a document entitled "Acute Hospital Facility --Notice Of Discharge and Member Appeal Rights" (the "Discharge Notice") which said, among other things, "Your doctor has reviewed your medical condition and has determined that you can be discharged from the hospital on 10/1/01. You no longer require inpatient hospital care and can safely obtain any medical care you need in another setting.... Instead of providing care in a hospital we will arrange care for you with a Hospice Service or in a long term care facility." A copy of the Discharge Notice is attached hereto as Exhibit A.

Because neither Taryle, Arenson, nor Capek had made such a determination at that time, (nor indeed before Taryle's discharge order of November 7, 2001), and because her needs for acute medical care were continuing beyond the noticed discharge date, Mrs. Lego invoked her appeal rights for an immediate PRO review of the Discharge Notice by the Colorado Foundation For Medical Care ("CFMC" or "PRO") pursuant to the instructions for such appeal accompanying the Discharge Notice.

On October 11, 2001 CFMC sent a letter, addressed to the Patient's husband, with the heading "CONTINUED STAY REVIEW/NOTICE OF NON-COVERAGE (DENIAL NOTICE UPHELD)" (the "First Review Decision") which stated, among other things:

> On October 1, 2001, you requested an immediate review because you received, with the attending physician's concurrence, a notice of noncoverage from Secure Horizons on September 28, 2001 at 3:00 p.m. . . . We have determined that this admission was medically necessary and appropriate. We agree however, with the attending physician and the hospital that for the reasons specified below that the services you wife is currently receiving are not covered by Medicare because she no longer requires care in an acute care setting. Therefore, any inpatient hospital services received beginning October 10, 2001 after 12 noon will not be paid by Medicare... After a review of the medical record and the information provided, we determined that Secure Horizon's finding of non-coverage of

> services is appropriate and that your wife's continued stay is not medically necessary.

A copy of the First Review Decision is attached hereto as Exhibit B.

Because, among other things, neither Mrs. Lego's attending physician, Taryle, nor Capek, nor Arenson actually concurred in the Discharge Notice and, as discussed below, none of them expressed any belief that discharge on October 1, 2001 or October 10, 2001 was medically safe or appropriate, Mrs. Lego, through her husband, sought reconsideration of the First Review Decision by CFMC in accord with the instructions for such reconsideration set forth in that decision.

On October 22, 2001 CFMC sent a letter, addressed to the Patient's husband, with the heading "RECONSIDERATION NOTIFICATION (CONTINUED STAY DENIAL NOTICE DECISION UPHELD)" (the "Reconsideration Decision"). The Reconsideration Decision, in pertinent part, states:

> Your wife received, with her physician's concurrence, a notice of noncoverage from Secure Horizons on September 28th, and you requested that we review her hospital stay. A PRO physician reviewer determined that her admission of August 14, 2001, to [Porter] for care of an intracranial malignancy was medically necessary and appropriate. However, the physician reviewer agreed with your wife's physician and Secure Horizons that she no longer required acute care in a hospital setting

> because her condition, although complicated by a tracheostomy, could be safely and properly provided in either a long term care facility or hospice. "

The Reconsideration Decision continues:

> The physician reviewer upheld the original denial determination because: your wife's condition is medically stable, and discharge to a facility that can handle tracheostomy care, implement aspiration precautions, and teach her how to inflate and deflate the tracheostomy cuff is appropriate. Therefore, we have determined that Medicare will not pay the hospital for the inpatient services she is receiving (except for those covered services which can be paid for by Medicare Part B) beginning October 10, 2001.
>
> The physician reviewer also reconsidered the original liability determination that you knew that the denied services were not covered by Medicare. The physician reviewer determined that the original liability determination was correct."

A copy of the Reconsideration Decision is attached hereto as Exhibit C.

Because the underlying premise of the Discharge Decision, the First Review Decision and the Reconsideration Decision (collectively the "Decisions"), i.e., that Mrs. Lego's attending physician authorized and/or concurred in the original Discharge Decision, and believed that Mrs. Lego's continued stay at Porter

was not medically necessary after October 1, 2001, is utterly false and without basis in the record, and because, also, there is no genuine merit in the contention that no in-hospital care was needed by Mrs. Lego on October 1, 2001, Mrs. Lego invokes her right to request a hearing before an Administrative Law Judge as set forth in the instructions in the Reconsideration Decision.

III. THE REASONS FOR DISSATISFACTION WITH THE DETERMINATION OF NON-COVERAGE

The Decisions are keyed to Mrs. Lego's condition as of September 28, 2001, and the alleged belief of her attending physician that she did not then need acute care and that her continued stay at Porter was not medically necessary beyond October 1, 2001. A review of the Hospital file reviewed by the PRO contains no such determination by her attending physician, Tarlye, nor by her neuro oncologist; and her primary care physician, dismayed by the Discharge Decision, opined that continued acute care at Porter was then medically necessary. In fact, the only discharge decision made by any of these key physicians was the November 7, 2001 discharge order entered by Tarlye, pursuant to which Mrs. Lego left Porter and was transferred to her home on November 9, 2001.

Although Mrs. Lego, her physicians and her family were, during the week of September 24, 2001, discussing circumstances (including, without limitation, attaining a certain level of medical improvement) under which it might be appropriate to discharge her to a long-term acute care facility, no decision for a discharge

was made by Drs. Taryle, Capek or Arenson during that week, nor thereafter, until Taryle's November 7, 2001 discharge order.

In the view of these doctors Mrs. Lego needed continuous acute care long after September 28, 2001. For example, Capek stated: "One of my visits [with Mrs. Lego and her family] occurred during late September 2001 when the family received a notification of non-coverage. I spoke with Mrs. Lego and her husband and the treating physicians at that time and she was clearly not ready to be discharged to home and was in continuing need of acute care." See letter from Capek dated December 20, 2001 attached hereto and incorporated herein by reference as Exhibit D.

As another example, Sheldon Goldberg, M.D. ("Goldberg") a rehabilitation specialist and consultant involved in Mrs. Lego's care stated: "My recommendation to the family and to the Attending physician [Taryle] was transfer to a long term acute care hospital where Mrs. Lego would be able to receive the intensity of pulmonary care as well as rehabilitation and family training as appropriate. It was my opinion that this level of care was medically necessary." See letter from Goldberg dated December 20, 2001 attached hereto and incorporated herein by reference as Exhibit E.

Robert A. Sandhaus, M.D. ("Sandhaus"), a pulmonary and critical care physician and consultant also stated: "In a patient like Mrs. Lego, who suffered from prolonged respiratory failure requiring mechanical ventilation and eventual tracheostomy, acute services would be essential. . . . As was suggested

by several physicians, until a certain level of improvement was attained, any discharge would require transfer to an appropriate acute care facility. . . Overall, my review of Mrs. Lego's hospitalization indicates she remained in the acute hospital setting exactly long enough to enable a safe and proper discharge. An earlier discharge would have been premature in this setting, and would have posed grave medical risks to this patient who then (and now) has the prospect of many months of quality life ahead of her. See letter from Sandhaus dated December 12, 2001 attached hereto and incorporated herein by reference as Exhibit F.

Arenson also added a note to Mrs. Lego's medical chart on September 28, 2001 which reads in part: "Family will require approximately 10 days to assess appropriateness of LTAC vs. Hospice Inst vs. Home Care. She cannot be discharged any sooner. . . " The remainder of this note further suggests that any earlier discharge would compromise Mrs. Lego's safety.

Arenson's opinion is further expanded in his December 20, 2001 letter, attached hereto and incorporated herein by reference as Exhibit G. It states, in part: "Although the tumor diagnosis is one that predicts eventual progression of the disease, the course of this disease is quite variable and patients can live for variable lengths of time, sometimes years, before progression. Under these circumstances, it made sense to try to optimize Mrs. Lego's function and quality of life. In my view, there was simply no possibility of her being discharged to her home prior to the actual November discharge date, at which time her condition had become sufficiently stable that the family,

with proper training and some assistance, could actually see to her needs at home.... In summary, Mrs. Lego is currently at home under hospice care where she is quite comfortable and is able to enjoy the presence of her family and will enjoy the Christmas holiday. This was made possible by a prolonged hospitalization at Porter Hospital during which her condition became stable enough so that the family, along with help from hospice and private nursing, was able to maintain care at home. This would not have been possible had it not been for the prolonged hospitalization, and any other option would have been absolutely medically unacceptable under the circumstances."

And Taryle clearly believed that Mrs. Lego needed acute care after October 1, 2001. He stated with respect to the time period of the first week of October 2001: "At that time it was my opinion that specific goals could be achieved over an approximately 14 day period in an appropriate setting. These goals were downsizing the tracheostomy, working with cuff defilations up to approximately 16 hours a day, speech using a Passe-Muir valve and a more aggressive swallowing program. It was my opinion that experienced respiratory therapist, speech therapist and dieticians were necessary for these goals to be accomplished. . . . it is my general impression that this could have been accomplished in an acute care setting and acute rehab setting or a long-term acute care setting. To the best of my knowledge facilities like SNF units or nursing homes would not have these facilities available." See letter from Taryle dated December 11, 2001 attached hereto and incorporated herein by reference as Exhibit H.

It is thus evident that Mrs. Lego's acute care needs continued well after October 1, 2001, and that such acute care was medically necessary until she reached an acceptable level of stabilization.

Although negotiations for Mrs. Lego's transfer to a long-term acute care facility (Kindred) apparently began in September, 2001, Secure Horizons and Kindred did not reach agreement on the terms of such transfer (Secure Horizons reportedly being unwilling to provide more than one week of such care; alternatively it would pay for Mrs. Lego's stay at Kindred only on a "sub-acute care" basis) and by mid-October that option, according to hospital sources, was dropped from consideration by Secure Horizons.

In light of both the clear medical necessity for continued acute care for Mrs. Lego, and of Secure Horizon's unwillingness to provide a level of long-term acute care, outside Porter, acceptable to Mrs. Lego's physicians, Taryle decided, in conjunction with hospital officials, that until his goals could be accomplished and Mrs. Lego reached a certain level of stabilization, and until training for family members to provide care once Mrs. Lego was discharged to a home hospice setting could be completed, Mrs. Lego was to remain in at Porter. Dr. Taryle communicated that decision to Mrs. Lego's family on or about October 10, 2001 with the words "we'll do it here (i.e., at Porter)." That process took until November 9, 2001.

Contrary to the Decisions, there was thus no determination by Mrs. Lego's attending physician that she did not need acute care on or after October 1, 2001, or that her continued stay at Porter thereafter, until

November 7, 2001, was not medically necessary. Indeed, any such alleged determinations are expressly contrary to the opinion of Dr. Taryle, the attending physician, and to the opinions of several other physicians directly involved with, or who have carefully reviewed Mrs. Lego's case. See the statements of Capek, Goldberg, Sandhaus, Arenson and Taryle, in Exhibits D through H, respectively.

There are two entries in Mrs. Lego's medical record which Secure Horizons apparently decided to play as a possible basis for the Discharge Decision. Reliance on these entries, however, is unwarranted and manifestly contrary not only to Taryle's position and opinions, but to the very language contained in those entries.

The first entry appears as a 9/28/01 suggestion on Mrs. Lego's chart in handwriting other than Dr. Fenton's (but with Fenton's apparent signature beneath): "Pt may be discharged to hospice or LTAC when rm. available and family decides. T.O. Dr. Fenton/mmunay RN".

A companion entry dated 9/28/01, again in handwriting other than Fenton's (but with Fenton's apparent signature beneath), states: "case mgt: Discussed D/C options t Dr. Fenton. He states hospice, home care or LTAC all appropriate depending on family's wishes. Pt. Stable for D/C per Dr. Fenton. -- Mmunay RN."

Dr. Fenton ("Fenton"), however, was never Mrs. Lego's attending physician, and the first chart notation in no sense constitutes a "discharge order" for

Mrs. Lego's authorized release from Porter. He is merely one of a group which includes seven other doctors in Taryle's medical office (South Denver Pulmonary Associates, P.C.) who were temporarily covering some of Taryle's patients at Porter when Taryle was unavailable. Taryle has indicated that he did not concur in any suggestion in the foregoing September 28, 2001 notations (i) that Mrs. Lego no longer needed acute care, (ii) that it was appropriate to discharge her on October 1, 2001, or (iii) that it was not medically necessary for Mrs. Lego to remain at Porter beyond October 1, 2001. Taryle's entire course of action after September 28, 2001 shows that he did not concur in any alleged suggestion by Fenton that Mrs. Lego could be unconditionally discharged on October 1, 2001. See also the key physicians' opinions in attached exhibits D through H, indicating that continuing acute care remained necessary on October 1, 2001 and/or that it would have been a threat to Mrs. Lego's health to discharge her to anything other than an LTAC facility at that time.

Moreover, the first Fenton notation does not indicate that Mrs. Lego does not need acute care; it indicates, indeed, that she be discharged to an LTAC (Long Term Acute Care) facility when a room becomes available; and it does not authorize or direct a discharge, or specify a discharge date. Additionally, that first notation appears to be conditional on two things: (i) there must be a room available; and (ii) the family must decide. Neither condition was met on September 28, 2001, nor on October 1, 2001, nor at any time thereafter until November 9, 2001.

The companion note of 9/28/01, by

acknowledging that discharge to an LTAC is "appropriate", is consistent with Fenton's first notation indicating that Mrs. Lego could be discharged to an LTAC or hospice care, depending on room availability and the family's desire i.e., implying deference to the need for further acute care at an LTAC facility if that is consonant with family wishes, but also recognizing the possibility that the family may then wish to waive that sort of continued care, and opt for hospice or home care instead.

Any suggestion in the foregoing notations, signed by Fenton, that discharge was appropriate on October 1, 2001 is further belied by Arenson's late September notation, quoted above, which indicated that Mrs. Lego could not be discharged before the family completed an assessment of the appropriateness of LTAC, home hospice or home care (a period expected to take not less than 10 days), and that discharge any sooner would compromise Mrs. Lego's safety.

Fenton's notations, in context, simply do not contain any clear language supporting the lynchpin holding of the Decisions, i.e., a determination by Mrs. Lego's attending physician that Mrs. Lego did not need acute care, and it was no longer medically necessary for her to remain at Porter after October 1, 2001. Moreover, there was no other medical writing in the record reviewed by the PRO suggesting that it would have been appropriate to discharge Mrs. Lego on October 1, 2001. Indeed, the medical record of Taryle's actions after October 1, 2001 confirms that Mrs. Lego had a further need for acute care, and it was medically necessary for her to remain at Porter, after October 1, 2001. And this is sharply buttressed, of course, by the

opinions of Arenson, Capek, Sandhaus, and Goldberg.

The Decisions, purporting ultimately to deny Mrs. Lego coverage after October 10, 2001, the day before the date of the First Review Decision, are insupportable and provide no basis to deny that coverage. Mrs. Lego thus requests a hearing before an ALJ to reverse the Decisions, confirm coverage, and correspondingly deny that Mrs. Lego has any responsibility (beyond co-pay) for expenses relating to the subject hospital stay.

IV. ADDITIONAL EVIDENCE

1. To the extent not otherwise provided by Secure Horizons, or PRO, Mrs. Lego will introduce as additional evidence the record reviewed by PRO.

2. To the extent not otherwise provided by Secure Horizons, or PRO, Mrs. Lego will introduce as additional evidence the medical and other records of that part of the subject hospital stay which occurred from 10/01/01 through 11/09/01.

3. Additional statements and/or live testimony from Tarlye. Address: South Denver, Pulmonary Associates, P.C., 499 East Hampden Ave., Suite 300, Englewood, CO 80110.

4. Additional statements and/or live testimony from Capek. Address: Harvard Park Family & Adult Medicine, 950 E. Harvard Ave., Suite

660, Denver, CO 80210.

5. Additional statements and/or live testimony from Arenson.
Address: Colorado Neurological Institute, 701 E. Hampden Ave., Suite 160, Englewood, Colorado 80111

6. Additional statements and/or live testimony from Goldberg.
Address: 4485 Wadsworth Blvd., Ste. 301, Wheatridge, CO 80033.

7. Additional statements and/or live testimony from Sandhaus.
Address: National Jewish Medical and Research Center, 1400 Jackson Street, Denver, CO 80206.

EXHIBIT A
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

APPELLANT:	BERNADETTE F. LEGO
HICN/Docket No.:	xxx-xx -8388
BENEFICIARY:	CENTURA HEALTH
Hearing Scheduled:	Monday, November 22, 2004, 8:30 a.m. 1244 Speer Blvd. Suite 752 Denver, CO 80204

EMERGENCY MOTION TO CONTINUE HEARING AND FOR EXPEDITED DETERMINATION OF SUCH CONTINUANCE

The Estate of Appellant Bernadette F. Lego ("Appellant"), through its representative, Robert T. Lego (the "Representative"), respectfully moves, on serious medical grounds, for an expedited determination on this Motion, and to continue the hearing (the "Subject Hearing") in this case, currently set for Monday, November 22, 2004.

MOTION

A. Background

1. This appeal was originally filed in December of 2001 and a hearing (the "Original Hearing") was scheduled in due course.

2. The Representative appeared in person for the Original Hearing, but was notified at the time and place of such appearance by an assistant to Patrick

Augustine, Administrative Law Judge ("ALJ"), that said Hearing was being vacated by the ALJ because, inter alia, (i) Centura Health, through counsel, had previously advised it would not appear or otherwise participate in the Original Hearing, (ii) it did not so appear for that Hearing nor otherwise contest or participate in the appeal process respecting this case, and (iii) Appellant had produced a formal Statement from Centura Health showing no claimed balance owing on Appellant's account in relation to Porter Hospital for any services bearing on the subject of this Appeal. The Representative was also informed at that time that the subject claim by Centura Health was being dismissed, and that a formal writing confirming such dismissal would be forthcoming in due course.

3. Despite the foregoing, the Representative was notified more than a year later that the ALJ wanted to hold a hearing on Appellant's appeal after all, and to have the ALJ's "own expert" witness present. A rescheduled hearing was thereupon set, and then reset a number of times on the initiative of the ALJ, reportedly to accommodate the availability or appearance of such and "expert".

4. On or about November 19, 2004, as a result of serious illness, described below, the Representative contacted the office of the ALJ by telephone, seeking to report his consequent inability to attend the Subject Hearing, and the need to reschedule it. In this regard he sought first to speak to Sherry Meiers, an assistant to the ALJ with whom he had been dealing telephonically on the subject Appeal for several years. When, however, Ms. Meiers proved unavailable, the Representative was directed by an operator to a

lady named "Janie", and then to Ms. Sharon Williams on the matter. Ms. Williams indicated that she would advise the ALJ of the medical nature of the circumstances and get back to the Representative via telephone.

5. Ms. Williams thereafter contacted the Representative to report that the ALJ indicated that he was "frustrated" with the delays in the case, and that the Subject Hearing would proceed as scheduled, regardless of the Representative's medical situation or any other circumstances. After expressing his dismay that the ALJ would make such a decision out of "frustration", without considering the circumstances, the Representative sought Ms. Williams' cooperation in asking the ALJ to please reconsider the matter. Ms. Williams agreed to do so, and shortly called back to say she had "gone that extra mile" and learned that the ALJ was receptive to reconsideration, but only if he could, that afternoon, speak directly by telephone to the Representative's physician on the medical situation.[1]

6. In response, special arrangements were promptly made for the ALJ and the Representative's physician, Richard Capek, M.D. ("Dr. Capek"), to speak directly with each other by telephone on November 19, 2004 regarding the Representative's illness and condition, and they did so.

7. Dr. Capek reported to the Representative after the latter call that the ALJ again expressed "frustration" over delays in this case, but was inclined, with apparent reluctance, to allow the request for continuance. However, the ALJ reportedly told Dr. Capek he wanted to speak also to Centura Health's

counsel about this. The ALJ, according to Dr. Capek, added that a "decision" on the continuance would be forthcoming by 5:00 p.m. that same day, and Dr. Capek said he understood that the Representative would be notified of the decision by that time.

8. The Representative awaited word, but has received no communication from anyone regarding such a "decision" on the continuation request subsequent to the medical briefing in the ALJ's call last Friday with Dr. Capek. Accordingly, the Representative is filing this Motion to now formalize the request to continue the Subject Hearing on medical grounds. Counsel for Centura Health was apprised via voice-mail telephone message on Saturday, November 20, 2004, that this Motion would be filed and that the Representative would not be able, for health reasons, to attend the Subject Hearing.

B. The Medical Circumstances Prompting This Motion

9. The Representative, a litigation lawyer with a substantial case docket, has been preparing for the Subject Hearing and anticipated the capacity to properly do so. He has been significantly impaired in that regard, however, by a variety o f health problems which began in mid-September of this year. This has prompted numerous visits to Dr. Capek; several consultations indicate that he is now experiencing the debilitating effects of a combination of two things: (i) a lasting bronchial/respiratory infection, and (ii) the unexpected recurrence of another medical condition, apparently related to the demands of that litigation schedule, including this case.

10. The latter condition has recently necessitated Dr. Capek's imposition of somewhat dramatic restrictions on work hours, and these restrictions, in combination with the impact of the former condition, make it impossible at this point for the Representative to adequately prepare for and competently attend the Subject Hearing this Monday.

11. Attached and incorporated herein, without waiving confidentiality, is Dr. Capek's affidavit (the "Affidavit"),[2] noting the relevant history and explaining the nature of the Representative's primary condition, its symptomology, and its practical effects on the Representative's work capacity and availability to be present at the Subject Hearing. The Representative's present respiratory condition, the stress of meeting a host of deadlines in his current case load, and the stated restrictions on service time, present a foreboding situation. The Representative cannot, under the circumstances, complete hearing preparations and participate in the Subject Hearing, as currently scheduled, without grave and increased threat to his present health, and without danger of functional incapacity at said Hearing.

12. The Representative regrets any inconvenience to the ALJ and to any affected parties from these circumstances. However, his now suffering health simply compromises his ability to adequately prepare for and attend the currently scheduled Subject Hearing. The Appellant should not be deprived at the Hearing of a fully functioning Representative; and the Representative should not be forced to risk further adversity when vacation of the Subject Hearing date for good cause can alleviate the difficulties and

accommodate medical necessity, when this is the first time Appellant has moved for such a continuance in this case, and when the ALJ has repeatedly initiated continuances of prior settings in this matter to accommodate his own schedule or convenience, and/or the ostensible needs of prospective witnesses.

13. Continuation of the Subject Hearing is appropriate and necessary under these medical circumstances, would be just, and avoid unnecessary prejudice to the Appellant. See generally In re Todd, 980 P.2d 973 [1999.CO.42144 http://www.versuslaw.com at Par. 31] (counsel's medical emergency "clearly constitutes good cause under Rule 121, section 1-11, for granting a continuance because it is an unforeseen and exceptional circumstance"); see also Valley Nat'l Bank of Cortez v. Chaffin, 718 P.2d 259 (Colo. App. 1986) where the Court noted that ". . . the failure of a party to appear because of illness is a good cause for continuance, and a denial thereof is an abuse of discretion by the trial court" (citing Pollard v. Walsh, 194 Colo. 566, 575 P.2d 411 (1978) (plaintiff); Gallavan v. Hoffner, 154 Colo. 353, 390 P.2d 817 (1964) (defendant).

WHEREFORE, Appellant respectfully prays that the Subject Hearing be continued and reset upon proper notice.

DATED this 21st day of November, 2004.

RESPECTFULLY SUBMITTED,
/s/ Robert T. Lego
Robert T. Lego
REPRESENTATIVE OF APPELLANT

Footnotes

1 The Representative was scheduled to see his doctor later that afternoon.

2 The copy of the Affidavit attached to this Motion is unsigned due to weekend time constraints. Dr. Capek, however, has approved the contents of the Affidavit and authorized its attachment to this Motion as his statement. The actual, confirming Affidavit, duly signed and notarized, will be forwarded to the ALJ as soon as possible, probably by Monday, November 22, 2004, the Subject Hearing date.

SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS

APPELLANT: BERNADETTE F. LEGO
HICN/Docket No. xxx-xx -8388
BENEFICIARY CENTURA HEALTH
Hearing Scheduled: Monday, November 22, 2004, 8:30a.m.
1244 Speer Blvd, Suite 752
Denver, CO 80204

CONFIDENTIAL AFFIDAVIT OF RICHARD CAPEK M.D., PERTAINING TO PATIENT ROBERT T. LEGO

County of Douglas
State of Colorado

I, Richard Capek, being of lawful age and duly sworn upon my oath do depose and state follows:

1. I am a physician currently licensed to practice medicine in the State of Colorado.

2. In that regard my medical practice is devoted to internal medicine, and Robert T. Lego is a patient followed in my practice.

3. Mr. Lego has authorized the use of the confidential medical information disclosed herein only for the limited purpose of supporting a motion pertaining to his inability, for medical reasons, to participate in the pending November 22, 2004 hearing scheduled in the above-captioned matter before an Administrative Law Judge of the Social Security Administration.

4. Mr. Lego has a long history of anxiety attacks, necessitating medical intervention, including prescription of medications, restrictions on hours of work in his legal practice, and hospital emergency treatment.

5. These attacks often include the following symptoms:

heart palpitations
hot sweats
colds sweats
rapid pulse
temperature vacillation
sleep disorders (disturbances, prevention, interruptions and deprivation)
headaches
dizziness
disorientation and/or uncontrollable feelings of apprehension.

6. In consequence of these attacks, Mr. Lego frequently experiences additional adverse health consequences, including low resistance and associated susceptibility to various infections. He also experiences in this regard debilitating bouts of fatigue, disorientation, concentration difficulties and significant impairment of ability to perform his work.

7. As a result, in the past I have restricted Mr. Lego's work hours, for example, in certain extended periods, like some following the death of his wife, to no more than eight hours per day, not more than forty hours per week, to control these symptoms and consequences. Furthermore, this regimen has proved effective, and

Mr. Lego until recently has not suffered recurrence of these anxiety attacks.

8. In the last six weeks Mr. Lego has seen me several times to address a return of these anxiety attacks, and they have been both frequent and quite severe. The advent and magnitude of these attacks is understood to be related to developments in his litigation case load, including the need for Mr. Lego, a sole practitioner, to accomplish extensive trial preparation work often in a compressed period of time, and to then proceed to trial and/or hearing.

9. Additionally, I believe the persistent bronchial/respiratory infection which Mr. Lego has suffered since mid-September of this year has both exacerbated, and been exacerbated by, his anxiety condition, possibly contributing to that infection well beyond the time I would otherwise expect it to have resolved.

10. Mr. Lego has been undergoing continuing medical testing and evaluation in this office on the anxiety matter. In my opinion, additional tests will be required and it has been medically necessary to recently impose more stringent restrictions than before, not only to manage his present condition but to avoid even more dangerous illness. It is essential that he minimize, if possible, any occasions for significant stress during this evaluation period: this will help clarify the situation and enable me to rule out another serious illness. I have therefore prescribed that he limit his work activities to no more than four hours daily during the next few months, or until these symptoms are clarified, resolved and any related illness diagnosed and treated.

FURTHER THE AFFIANT SAYETH NAUGHT.

Richard Capek, M.D.

VERIFICATION

The foregoing Affidavit of Richard Capek, M.D. was subscribed and sworn to before me this 23 day of November, 2004 by Richard Capek, M.D., Affiant as true and correct to the best of his knowledge and information. Witness my hand and official seal.

s/Brenda A. Hart
Notary Public

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March 3, 2005

Medicare Appeals Council Department Appeal's Board Medicare Operations Division, DHHS, Hubert H. Humphrey Building, Room 633F 200 Independence Ave., S.W. Washington, D.C. 20201

Re: In re Bernadette F. Lego, (Deceased) HICN/Docket No.: xxx-xx -8288 -Request For Review By Medicare Appeals Council Of ALJ's 12/29/04 Order of Dismissal

Dear Council or Board Member:

The Estate of Appellant/Beneficiary Bernadette F. Lego, Deceased ("Appellant"), through its representative, Robert T. Lego (the "Representative"), respectfully requests that the Medicare Appeals Council review the December 29, 2004 Order of Dismissal (the "Order") entered in this case by Administrative Law Judge Patrick B. Augustine (the "ALJ").

The Order dismisses this case for the non-appearance of the Representative at the hearing (the "Hearing") scheduled before the ALJ in this matter for Monday, November 22, 2004 at 8:30 a.m., despite the

fact that the Representative submitted substantial evidence, including a Physician's Affidavit establishing good cause for not so appearing. The Representative respectfully submits that the ALJ seriously misapprehended that evidence, and the Order should accordingly be vacated.

I. BACKGROUND

1. The Request for Hearing before the ALJ was originally filed on behalf of the Appellant in December of 2001 and a hearing (the "Original Hearing") was scheduled in due course.

2. The Representative appeared in person for the Original Hearing, but was notified (by Ms. Meiers, an assistant to the ALJ) at that time and place that it was being vacated because, inter alia, (i) Carrier/Intermediary/PRO Centura Health ("Centura Health"), through counsel, had previously advised the ALJ's office it would not appear, contest Appellant's position, or otherwise participate in the Original Hearing, (ii) it did not so appear for that Hearing nor otherwise contest or participate in the appeal process respecting this case, and (iii) Appellant had produced a formal Statement from Centura Health showing no claimed balance owing on Appellant's account in relation to Porter Hospital for any services bearing on the subject of that Request for Hearing. The Representative was also then informed that the related claim by Centura Health would be dismissed, and that a formal confirmation writing would be forthcoming in due course.

3. Nevertheless, the Representative was

notified more than a year later (by the same assistant) that the ALJ, after learning from a staff person (who was reportedly writing the opinion for the ALJ) of "issues" which yet might be considered, had changed his mind, and had opted to hold a hearing on the matter after all, and wanted to have the ALJ's "own expert" witness present for such proceedings. A rescheduled hearing was thereupon set and reset a number of times, each on the initiative of the ALJ, reportedly to accommodate the availability or appearance of such an (heavily booked) "expert".[2]

4. On or about Friday, November 19, 2004,[3] as a result of a serious illness which is described infra, the Representative contacted the office of the ALJ by telephone, seeking to report consequent inability to attend the Hearing, and the necessity of rescheduling it. In this regard he sought first to speak to Ms. Sherry Meiers, the same assistant to the ALJ with whom he had been dealing, both telephonically and in person, on the subject controversy for several years. When, however, Ms. Meiers proved unavailable, the Representative was directed by an operator to a lady named "Janie", and then to Ms. Sharon Williams who indicated that she would immediately advise the ALJ of the medical nature of the situation and personally call back.

5. Ms. Williams thereafter telephoned to specifically report that the ALJ was "frustrated" with delays in the case, and that the Hearing would proceed as scheduled, regardless of the Representative's medical situation or any other circumstances. After expressing dismay that the ALJ would make such a decision out of "frustration", without considering the

actual circumstances, the Representative pled for Ms. Williams' further intercession in asking for the ALJ's reconsideration. Ms. Williams agreed to do so, and shortly called back again to say she had "gone that extra mile" and learned that the ALJ was receptive to reconsideration, but only if he could, in the remaining hours of that afternoon, speak directly by telephone to the Representative's physician on the medical situation. Incidentally, she added that the ALJ would not speak directly with the Representative at any time that day.

6. In response, special arrangements were promptly made for the ALJ and the Representative's physician, Richard Capek, M.D. ("Dr. Capek"), to speak directly with each other by telephone that same afternoon regarding the Representative's illness and condition, and they did so. The Representative, however, was not permitted to participate and there is no indication of a record being made of this conversation.

7. Dr. Capek reported to the Representative after the latter call that the ALJ again expressed "frustration" over delays in the case, but seemed to be reluctantly inclined to allow the request for continuance. However, Dr. Capek, said that the ALJ wanted to first speak also to Centura Health's counsel about this. The ALJ, according to Dr. Capek, added that a "decision" on the continuance would be forthcoming by 5:00 p.m. that same day (Friday, November 19, 2004), and Dr. Capek said he understood that the Representative would be notified of the decision by that time.

8. The Representative awaited word that day,

but received no communication from anyone regarding such a "decision" on the continuation request subsequent to the medical briefing in the ALJ's call that Friday with Dr. Capek .[5]

9. Accordingly, the Representative filed an Emergency Motion To Continue Hearing And For Expedited Determination Of Such Continuance (the "Emergency Motion") (copy attached hereto as Exhibit A) via courier before 8:30 a.m. on Monday, November 22, 2004 to formalize the request to continue the Hearing on medical grounds. Counsel for Centura Health was apprised via voice-mail telephone message on Saturday, November 20, 2004, that said Motion would be filed and that the Representative would not be able, for health reasons, to attend the Hearing.

10. The Emergency Motion, supported by a then (solely for logistical reasons) unsigned[6] Affidavit of Dr. Capek, related the medical condition prompting the continuance request. In particular, the Representative, a litigation lawyer with a substantial case docket, had been preparing for the Hearing and anticipated the capacity to properly do so. He had been significantly impaired in that regard, however, by a number of health problems which began in mid-September of 2004. This prompted numerous visits to Dr. Capek; several of those consultations confirmed that he was suffering debilitating effects of a combination of two things: (i) a lasting bronchial/respiratory infection, and (ii) the unexpected recurrence of another medical condition, apparently related to the demands of the litigation schedule, including this case.

11. The latter condition had, five weeks prior

to the Hearing, necessitated Dr. Capek's imposition of rather dramatic restrictions on work hours; in combination with the impact of the chronic respiratory infection, the new restrictions made it impossible in the several days preceding the scheduled Hearing for the Representative to adequately prepare for and competently participate in the scheduled Hearing.

12. Dr. Capek's Affidavit shows inter alia that:

a. The Representative has a long history of anxiety attacks, necessitating medical intervention, including prescription of medications, restrictions on hours of work in his legal practice, and hospital emergency treatment.

b. These attacks often include the following symptoms:

heart palpitations
hot sweats
colds sweats
rapid pulse
temperature vacillations
sleep disorders (disturbances, prevention, interruptions and deprivations)
headaches
dizziness
disorientation and/or
uncontrollable feelings of apprehension.

c. In consequence of these attacks, The

Representative frequently experienced additional adverse health consequences, including low resistance and associated susceptibility to various infections. He also experienced in this regard debilitating bouts of fatigue, disorientation, concentration difficulties and significant impairment of ability to perform his work.

d. As a result, in the past Dr. Capek restricted had the Representative's work hours, for example, in certain extended periods, like some following the death in 2002 of his wife, to no more than eight hours per day, nor more than forty hours per week, to control these symptoms and consequences. Fortunately, this regimen proved effective, and until mid fall of 2004 he had not suffered a recurrence of these attacks.

e. In the six weeks before the Hearing, the Representative had seen Dr. Capek several times to address a return of such attacks, and they had been both frequent and severe. The advent and magnitude of these attacks is understood to be related to the toll in his litigation case load, including the need, as a sole practitioner, to accomplish extensive trial preparation, often in a compressed period of time, and to then proceed to trial and/or

hearing.

f. Additionally, Dr. Capek believed the persistent bronchial/respiratory infection which the Representative encountered since mid-September, 2004 both exacerbated, and was exacerbated by, the anxiety condition, possibly contributing to that infection well beyond the time his Doctor would otherwise expect it to have resolved.

g. The Representative had been undergoing continuing medical testing and evaluation in Dr. Capek's office on the anxiety matter. In the Doctor's opinion, additional tests were required and it was medically necessary, in the weeks before the Hearing, to have imposed more stringent restrictions than before, not only to manage his present conditions, but to avoid even more dangerous illness. Dr. Capek opined that it was essential that any occasions for significant stress be minimized if possible during the evaluation period; this to help clarify the situation and enable Dr. Capek to rule out another serious illness. He therefore prescribed limitations on work activities to no more than four hours daily during the few months following the first imposition (in October of 2004) of such limitations, or until these symptoms were clarified,

resolved and any related illness diagnosed and treated.

13. Notwithstanding the filing of the Emergency Motion, the brief telephone conversation between the Doctor and the ALJ on Friday, 11/19/04, Dr. Capek's corroborating Affidavit, and the absence of any conflicting evidence, the ALJ issued the Order which finds that the Representative "has not established a good reason for failure to appear [at the Hearing]". The proffered evidence, however, readily demonstrates such good reason, rendering the Order erroneous and reversible.

II. ARGUMENT

A. Introduction

14. Underlying the Order are a number of findings which ignore overwhelming evidence, are unsupported by the evidence, or are manifestly contrary to the unrebutted evidence; these findings prompt unsupported and unsupportable conclusions employed by the ALJ in an effort to justify dismissal of this case. Notable in this regard are the ALJ's (i) misconception that the matter had been truly pending for four years, and had been delayed only or largely because of the Representative, (ii) apparent disregard or minimization of the seriousness of the Representative's medical conditions, (iii) misunderstanding or misreading of Dr. Capek's recently imposed work restrictions; the ALJ tabbed them at 40 hours per week, whereas Dr. Capek's Affidavit clearly indicates they were for 4 hours per day, (i.e., 20 hours per week), and (iv) erroneous resulting belief that the Representative could (under

the circumstances) have adequately prepared the case in time to appear for the Hearing. These misapprehensions and errors, among others, surface repeatedly in the Order's discussion, tainting the entire ruling with reversible error, if not the disturbing colors of prejudgment, prejudice or whim.

B. The Underling Record Is Not Complete And, Hence, Provides An Inadequate Basis

For Review; As A Result, The Order Should Be Vacated.

15. As an initial matter, it should be noted that there are serious gaps in the recorded record underlying this case. In this regard, no recording was apparently made of the Original Hearing, contrary to 20 C.F.R. §416.1451, which requires the administrative law judge to make a complete record of the hearing proceedings. Moreover, there appears to be no contemporaneous recording by a court reporter made of the ALJ's impromptu telephone conversation with Dr. Capek during the afternoon of November 19, 2004.

16. The Order relies importantly on both of these proceedings in making various determinations. Since, however, there is no recording of these proceedings, it is not possible to review the findings based thereon. In view of the violation of the aforestated regulation, and of fundamental concepts of fairness, it would be manifestly unjust to permit the Order to stand; it should be vacated for this reason alone, and the case reinstated.

17. Even assuming an adequate record for

review, however, the Order remains so tainted with reversible error (as shown infra) that it should be vacated and the case reinstated.

C. The ALJ's Assumption/Finding That The Case Has Been Pending For Four Years, All Due To Delay By The Representative, Is Manifestly Unsupported By, And Indeed Contrary To The Record.

18. An underlying current in the Order is the ALJ's professed belief and corresponding finding that this case had been actively pending for a full four years at the time of dismissal (see e.g., first and second full paragraphs on page 3 of the Order). In fact, the case had been pending for less than three years at the time of the Hearing. It was filed on December 31, 2001 and the Hearing was scheduled for November of 2004. The finding of a four year span (and its magnification by 133 1/3%) factored heavily in the ALJ's conclusion that no good cause was shown for continuing the Hearing, and so this error was manifestly prejudicial, justifying vacation of the Order.

19. Moreover, contrary to the Order's insinuations, the Representative was not genuinely responsible for delaying case administration. As noted above, the first hearing was not scheduled by the ALJ for over 18 months after the case was filed. It was then vacated by the ALJ because, inter alia, (i) Carrier/Intermediary/PRO Centura Health ("Centura Health") through counsel, had previously advised it would not appear or otherwise participate in the Original Hearing, (ii) it did not so appear for that Hearing nor otherwise contest or participate in the app process respecting this case, and (iii) Appellant had

produced a formal Statement from Centura Health showing no claimed balance owing on Appellant's account in relation to Porter Hospital for any services bearing on the subject controversy. The Representative was also informed at that time that the subject claim by Centura Health was being dismissed, and that a formal writing confirming such dismissal would be forthcoming in due course.

20. The Representative was thus surprised when he was notified that proceedings would resume and a second hearing on the matter would be rescheduled. It was rescheduled for July of 2004, over two and a half years after the matter was first filed. While the Representative had concerns and objections about the propriety of the ALJ's request for "his own expert" to attend any such hearing, the Representative did not delay scheduling a hearing based on such concerns and objections, and there is no evidence in the record that he did.

21. Conspicuously absent from the Order in this regard is any mention of the numerous times the Representative was contacted by Ms. Meiers of the office staff to reschedule such hearing on the request of the ALJ to accommodate the expert's schedule. The order's implication that the ALJ rescheduled a hearing on the subject appeal only once (i.e., in July of 2004 to allow him to attend a "management conference") is simply false. Moreover, until filing the Emergency Motion, the Representative had never sought to reschedule any set hearing in this case.

22. Under the circumstances, the Order curiously errs in seriously overstating the length of

time the case has been at issue, and also in tagging the circumstances underlying already imposing case delay. Both issues drive the ALJ's findings and conclusion, and such errors are manifestly prejudicial to the Representative and justify vacation of the Order and reinstatement of the case.

D. The Order Fails To Acknowledge The Seriousness Of The Representative's Medical Condition, And Discounts Or Ignores Uncontroverted Evidence Here, The Affidavit Of Dr. Capek.

23. The Order fails to adequately describe, or acknowledge, two medical conditions which Dr Capek addressed in his Affidavit, one of them (anxiety) extensively. This silence suggests that the ALJ minimized the physical nature of the condition, its effects, and its dangers. As noted above, Dr. Capek clearly indicated that the Representative suffered symptoms from anxiety that included heart palpitations, hot sweats, colds sweats, rapid pulse, temperature vacillations, sleep disorders (disturbances, prevention, interruptions and deprivations), headaches, dizziness, disorientation and/or uncontrollable feelings of apprehension. Dr. Capek emphasized that control of the anxiety was necessary to prevent more dangerous illness.

24. The nature and extent of this myriad of symptoms would inherently interfere with legal work, including headaches, dizziness, and disorientation. Dr. Capek related that the Representative's ongoing bronchial infection, which similarly inhibits work, was prolonged and exacerbated by such anxiety. Other symptoms, e.g., heart palpitations, rapid pulse and

temperature vacillations, on their face, also portend more serious illness.

25. The Order fails to acknowledge the seriousness, and the debilitating nature of the Representative's medical condition in reaching its conclusions. There was simply no evidence before the ALJ to suggest that this medical condition was anything short of serious and debilitating by the time of the Hearing, and the Order errs in implicitly or explicitly rejecting or discounting that evidence, or in purporting to preempt an expert's opinion with his own impressions (or suspicions).

E. The ALJ's Assumption That The Representative Was Subject To A Work Restriction Of 40 Hours Per Week Is Unsupported By, And Indeed Contrary To The Evidence.

26. Moreover, the Order is manifestly based on the ALJ's express premise that the Representative was limited by Dr. Capek to a forty hour work week to control anxiety. See e.g., the fourth, sixth, seventh and eighth paragraphs on pg 2 of the Order. Clearly, however, Dr. Capek indicated that the work restrictions had tightened to four hours per day as the Representative's symptoms grew increasingly worse over the six weeks preceding the Hearing,[8] leaving the Representative only 20 hours per week to fulfill his work obligations.

27. The ALJ's erroneous belief that the Representative's restrictions were set to forty hours per week caused him to find, in the seventh paragraph

on page 2 of the Order, inter alia, that the Representative could have prepared his case within a forty hour work week (there was no testimony or other evidence in the record supporting such a conclusion, incidentally), and that forty hour restriction "worked well in controlling the Representative's symptoms". This finding is manifestly contrary to Dr. Capek's Affidavit which indicated that, while Dr. Capek's prior work restrictions had worked well in previously controlling the Representative's condition, those work restrictions were tightened because the Representative's symptoms were growing worse over the six weeks before the Hearing. Accordingly, the conclusion in that sixth paragraph that the Representative "is able to function as an attorney efficiently and effectively within these restrictions" (40 hours) is patently unsupported by any substantial evidence in the record; indeed, it is contrary to the record.

28. The ALJ's erroneous belief that the Representative restrictions were set to forty hours per week caused him to find, in the eighth paragraph on page 2 of the Order (continuing onto the top of page 3), essentially that the demands of preparing for this case, and balancing the demands of this case with demands of the Representative's other cases could have been accommodated within the forty hour work restrictions. Again, the Representative was subject to tightening work restrictions during the six weeks prior to the Hearing. Whatever his schedule, his work restrictions and his abilities to work may have been prior to the setting of the Hearing, they changed dramatically between that setting and the Hearing date, and the Representative was not able to either balance the

demands of preparing this case and his other cases, or to adequately prepare for the Hearing. Further, the ALJ's position totally sidesteps the contributing impact of the bronchial/respiratory disorder during this pre-hearing period.

29. The ALJ's erroneous belief that the Representative restrictions were set to forty hours per week caused him to find, in the 1st full paragraph on the top of page 3 of the Order that the Representative's argument that he "could not have prepared or been available to pursue this case within his forty hour work restrictions is nothing by a last minute attempt to further delay this proceeding. . . ." Since, however, the Representative's work restrictions were actually 4 hours per day (20 hours per week) this finding is unsupported by, and contrary to the evidence.

30. The Order's supporting findings are thus materially tied to the ALJ's erroneous understanding that the Representative was able to work a forty hour week. He was, in fact, at all times material to the Emergency Motion restricted to a 20-hour work week. Accordingly, a key underlying basis for the Order is unsupported by and contrary to the manifest weight of the evidence. It should be vacated.

III. CONCLUSION

31. The Order concludes, in the second full paragraph on page 3, based in significant part on the erroneous finding that the case has been pending for four years, that no good cause is shown for the Representative's non-appearance.

32. This conclusion is based on an erroneous understanding of the length of the case (a misunderstanding repeated elsewhere in the Order). It is also based on an erroneous understanding of the actual medical circumstances and work restrictions under which the Representative was forced to operate.

33. The ALJ's focus on his belief that "four years is enough time to pursue this matter" is much is what the Order is about. The Representative, in fact, showed good cause to continue the Hearing. 20 C.F.R. §416.1457(b)(2) clearly indicates that, among others, any physical or mental limitations are to be considered in showing good cause for not appearing for a scheduled hearing. Nevertheless, the ALJ was preoccupied with "four years" being enough time to pursue this matter (as reflected in his initial refusal, described in Part 1, the Background section of this letter, to even consider evidence of the Representative's medical condition); he was not only wrong about the length of time the case had been pending and the circumstances underlying the course of case scheduling, but dangerously disinterested in or unwilling to conscientiously consider or be swayed by the substantial medical evidence actually demonstrating good cause for the Representative's non-appearance/request to continue the Hearing.

34. The Order's central findings, being unsupported by, and indeed contrary to, the evidence in the record, do not, in turn, support any valid conclusions that the Representative failed to show good cause for his non-appearance at the Hearing and request to continue the Hearing.

35. It would be inappropriate under the circumstances, if not a clear abuse of discretion, for this matter not to be determined on the merits, but dismissed on the ALJ's troubled findings and conclusions in the Order. Rather, the Order should be vacated, the disposition of the Request for Hearing properly considered, and a new hearing set to determine the matter on the merits. The Representative accordingly prays that the Medicare Appeals Council grant the Request for Review and, on consideration of the foregoing points, vacate the Order.

Very truly yours,
/s/ Robert T. Lego
Robert T. Lego, Representative.

Footnotes

[1] The Representative first received the Order and Notice of Dismissal on January 4, 2005, six days after the official date stamped on each of them. No Certificate of Service or Certificate of Mailing was include in the Notice of Dismissal. A courtesy or convenience copy of this Request for Review is also being hand delivered to the Denver office of the Office of Hearings and Appeals on or before March 4, 2005.

[2] Contrary to the Order's implication, at pg. 1, any difficulties in rescheduling the Original Hearing stemmed not from the Representative's refusal or inability to attend, but to repeated, sua sponte reschedulings by the ALJ to accommodate his expert. The Representative, with one significant exception, was generally available to attend a hearing on the resumed proceedings throughout the time between the

Original Hearing and the Hearing, subject only to previously scheduled business, including court appearances or trials and related appointments. The exception related to a 3-week vacation, also previously scheduled, involving travel out of the country.

[3] The Order erroneously reports this contact occurred on the day before the Hearing. The Hearing was on a Monday. The day prior to the Hearing was Sunday, a day when the ALJ's office is presumably closed. The actual contact was on Friday, 11/19/04, three days before the Hearing.

[4] The Representative was scheduled to see the doctor that same afternoon.

[5] Nothing, indeed, until the Order was received on the 4th of the following January, some 46 days later.

[6] The signed version of the same Affidavit was provided to the ALJ later that day (and is attached hereto as Exhibit B).

[7] Those new restrictions were first imposed, in fact, on or about October 18, 2004, and precipitated a separate Affidavit in confirmation thereof for a court in another case.

[8] For this reason, the Order's statement in the sixth paragraph of page 2 that the Representative did not raise any work restrictions when contacted in September by a "case technician" to set the Hearing in November is regrettably inane. The six week decline occurred after that contact.

Filed 1/30/2006
Civil Action No. 05-CV-1260-AP
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ESTATE OF BERNADETTE F. LEGO, deceased,
Plaintiff,

v.

MICHAEL O. LEAVITT, Secretary of the
Department of Health and Human Services, Defendant.

AMENDED COMPLAINT FOR JUDICIAL REVIEW

Plaintiff Estate of Bernadette F. Lego (the "Estate"), thru counsel Robert T. Lego ("Lego"), for its Amended Complaint in this action against the above-captioned Defendant, alleges as follows:

I. PARTIES, JURISDICTION AND VENUE

1. Bernadette F. Lego ("Mrs. Lego"), decedent of the Estate, Social Security Number XXX-XX-8288, was at all relevant times a Medicare beneficiary and a resident of Cherry Hills Village, Arapahoe County, Colorado. Lego was at all relevant times the appointed representative for Mrs. Lego with respect to Social Security and Medicare matters, and now continues in a representative role with respect to the Estate.

2. Mrs. Lego was at all relevant times enrolled in a Medicare+Choice Plan, SecureHorizons, issued by PacifiCare of Colorado, Inc. (the "Plan").

3. Defendant Michael O. Leavitt is the Secretary of the United States Department of Health and Human Services (the "Secretary"), the person designated by statute and/or regulation to be the defendant in judicial review actions such as this.

4. This is an action seeking judicial review of a final decision of the Secretary in his official capacity. This Court has jurisdiction pursuant to 42 U.S.C. §1395w-22(g)(5) and 42 U.S.C. §405(g).

5. The amount in controversy exceeds $2,000.00.

II. BACKGROUND

6. Mrs. Lego was diagnosed with a brain tumor in May of 2001. On July 20, 2001 Mrs. Lego was originally admitted under the Plan to Porter Hospital ("Porter"), a hospital in Englewood, Colorado operated by Centura Health ("Centura"), as a result of massive pulmonary emboli (blood clots) associated with her brain tumor and a suppressed immunity system resulting from continuing radiation and chemotherapy; she was discharged from that hospital on August 4, 2001. On August 14, 2001 Mrs. Lego was admitted to Porter under the Plan for a second time as a result of (grand mal and status elepticus) seizures, herpes encephalitis and pneumonia, among other tumor-related complications. After a period in Porter's intensive care unit, she was transferred to a traditional acute care room at Porter where she underwent continuous treatment before discharge by her attending physician on November 9, 2001.

7. On September 28, 2001 four representatives of

the Plan abruptly entered Mrs. Lego's room and handed Lego a document entitled "Acute Hospital Facility --Notice Of Discharge and Member Appeal Rights" (the "Discharge Notice") which said, among other things, "Your doctor has reviewed your medical condition and has determined that you can be discharged from the hospital on 10/1/01. You no longer require inpatient hospital care and can safely obtain any medical care you need in another setting.... Instead of providing care in a hospital we will arrange care for you with a Hospice Service or in a long term care facility" (emphasis added).

8. Because Mrs. Lego's treating physicians had not, in fact, made such a determination at that time respecting her then current stay at the hospital (nor, indeed, at any point before a treating physician's discharge order of November 7, 2001 respecting that stay), and because Mrs. Lego's needs for acute medical care were continuing beyond the noticed discharge date, Mrs. Lego promptly invoked her appeal rights for review of the Discharge Notice by the Colorado Foundation For Medical Care ("CFMC" or "PRO") pursuant to instructions for such appeal which accompanied the Discharge Notice.

9. On October 11, 2001 CFMC sent a letter, addressed to Lego, with the heading "CONTINUED STAY REVIEW/NOTICE OF NON-COVERAGE (DENIAL NOTICE UPHELD)" (the "First Review Decision") which stated in pertinent part: ". . . We agree, however, with the attending physician and the hospital that ... the services your wife is currently receiving are not covered by Medicare because she no longer requires care in an acute care setting. Therefore,

any inpatient hospital services received beginning October 10, 2001 after 12 noon will not be paid by Medicare... After a review of the medical record and the information provided, we determined that Secure Horizon's finding of non-coverage of services is appropriate and that your wife's continued stay is not medically necessary" (emphasis added.) A copy of the First Review Decision is attached hereto as Exhibit A.

10. Because, among other things, Mrs. Lego's attending physicians did not then actually concur with the Discharge Notice, nor had they determined or expressed any belief that her discharge from Porter on October 1, 2001 or October 10, 2001 was medically safe or appropriate, Mrs. Lego sought reconsideration of the First Review Decision by CFMC in accord with the instructions for such reconsideration set forth in that decision. On October 22, 2001 CFMC sent a letter, addressed to Lego, with the heading "RECONSIDERATION NOTIFICATION (CONTINUED STAY DENIAL NOTICE DECISION UPHELD)" (the "Reconsideration Decision"), which affirmed the First Review Decision. A copy of the Reconsideration Decision is attached hereto as Exhibit B.

11. On December 21, 2001 Mrs. Lego filed a Request For Hearing (the "Hearing Request") before an Administrative Law Judge (the "ALJ") on the matter. A hearing (the "Original Hearing") was scheduled in due course.

12. Lego appeared in person for the Original Hearing, but was notified (by Ms. Meiers, an assistant to the ALJ) at that time and place that it was being

vacated because, inter alia, (i) Centura through counsel had previously advised the ALJ's office that it would not appear, not contest Mrs. Lego's position, nor otherwise participate in the Original Hearing, (ii) Centura did not so appear for the Original Hearing, nor otherwise contest or participate in the appeal process then before the ALJ, and (iii) Lego had produced a formal Statement from Centura showing no claimed balance owing on Mrs. Lego's account in relation to Porter for any services bearing on the subject of that Hearing Request. Lego was also then informed that the related claim by Centura would be dismissed, and that a formal confirmation writing would be forthcoming in due course.

13. Nevertheless, Lego was notified more than a year later (by Ms. Meiers) that the ALJ, after learning from a staff person (who Ms. Meiers reported was writing the opinion for the ALJ) of "issues" which yet might be considered, had changed his mind, had opted to hold another hearing on the matter after all, and intended to have the ALJ's "own expert" witness attend and participate in such proceedings. A rescheduled hearing was thereupon set, and then reset a number of times, each on the sua sponte initiative of the ALJ, reportedly to accommodate the availability or appearance of that ALJ-chosen "expert".[1] The requested hearing was last reset for Monday, November 22, 2004 (the "November Hearing").

14. On Friday, November 19, 2004, as a result of serious illness, Lego contacted the office of the ALJ by telephone, seeking to report his consequent inability to attend the November Hearing, and the corresponding necessity of continuing it. The ALJ, through one of his

assistants, first indicated on that same day that he would not consider any request to reschedule it, despite the medical grounds, "since the case was so old". The ALJ later that day agreed to reconsider that refusal after Lego (via telephone) expressed surprise to the ALJ's assistant that the ALJ would make such a decision without consideration of evidence (and after the assistant had so advised the ALJ of Lego's surprise and concern). According to that assistant, however, the ALJ would only reconsider his initial refusal if he could, in the remaining hours of that very afternoon, speak directly by telephone to Lego's physician on the medical situation. The ALJ refused to speak directly with Lego on the matter at any time that day or thereafter.

15. In response to these impromptu ALJ conditions, special arrangements were immediately made for the ALJ and Lego's physician (the "Physician") to speak directly with each other by telephone that same afternoon regarding Lego's illness and condition, and they did so. Lego, however, was not permitted to participate in that call, and there is no indication of a record being made of the ALJ's conversation that day with the Physician.

16. The Physician reported to Lego, shortly after the latter call, that the ALJ expressed "frustration" over delays in the case, but seemed to be reluctantly inclined to allow the requested continuance. However, the Physician said that the ALJ wanted to first speak also to Centura's counsel about this. The ALJ, according to the Physician, added that a "decision" on the continuance would be forthcoming by 5:00 p.m. that same day (Friday, November 19, 2004), and the

Physician said he understood that Lego would be notified of that decision by that time via word from the ALJ's staff.

17. Lego then awaited word, but received no communication from anyone regarding a "decision" on the continuation request at any time subsequent to the medical briefing in the ALJ's call that Friday with the Physician. Accordingly, Lego filed an Emergency Motion To Continue Hearing And For Expedited Determination Of Such Continuance (the "Emergency Motion") via courier before 8:30 a.m. on Monday, November 22, 2004 to formalize the request to continue the Hearing on medical grounds. Counsel for Centura was apprised via voice-mail message directed to her office on Saturday, November 20, 2004 that the Emergency Motion would be filed early the following Monday and that Lego would not be able, for health reasons, to personally attend the November Hearing.

18. Notwithstanding (i) the filing of the Emergency Motion, (ii) the telephone conversation between the Physician and the ALJ on Friday, 11/19/04, (iii) the Physician's corroborating Affidavit, and (iv) the absence of any conflicting evidence, the ALJ issued an Order of Dismissal (the "Order") dated December 29, 2004 which dismissed the case, finding that Lego (as the Estate's representative) "has not established a good reason for failure to appear [at the November Hearing]". A copy of the Order is attached hereto as Exhibit C.

19. Lego timely filed a Request For Review of that Order with the Departmental Appeals Board (the "DAB") of the Medicare Appeals Council, doing so

pursuant to instructions accompanying the Order. On May 5, 2005 the DAB issued its "Action Of Medicare Appeals Council On Request For Review" (the "Review Denial"), denying the requested review, because the DAB determined that it was supported by evidence in the record and was consistent with applicable law and regulations. The Review Denial also stated that the Reconsideration Decision stands as a final decision of the Secretary. A copy of the Review Denial is attached hereto as Exhibit D.

20. The Plaintiff has exhausted its administrative remedies.

III. ENTITLEMENT TO RELIEF

21. Plaintiff incorporates by reference, as if restated verbatim, the allegations of paragraphs 1-20 above.

22. Plaintiff is entitled to relief because the Order, contrary to the Review Denial, was unsupported by substantial evidence in the record, and/or was contrary to statute, regulation or decisional authority. Alternatively, its entry was arbitrary and capricious and/or represented an abuse of discretion under the circumstances.

23. Plaintiff is also entitled to relief because the proceedings pursuant to which the Order was entered (including (i) the entire procedural history respecting the setting of a hearing before the ALJ, and (ii) the circumstances, beginning on November 19, 2004 with Lego's initial notification to the ALJ's office that his illness would prevent his attendance at the November

Hearing, and culminating in the Order) denied Plaintiff its constitutional rights of due process, including rights to proper and timely notice and hearing with respect to review of both the First Review Decision and the Reconsideration Decision, with respect the November Hearing, and also with respect to the Order.

24. In the alternative, Plaintiff is entitled to relief since the First Review Decision and the Reconsideration Decision were each improper in determining that Mrs. Lego should be discharged from Porter on October 10, 2001; that is, each decision was unsupported by substantial evidence in the record and each was contrary to applicable statutes, regulations, decisional authority and/or the Plan. Moreover, the issuance, respectively, of the First Review Decision and the Reconsideration Decision were arbitrary and capricious, and/or represented an abuse of discretion under the circumstances.

IV. PRAYER FOR RELIEF

25. WHEREFORE, Plaintiff respectfully prays for the following relief:

a. Reversal of the Order, with directions on remand to reschedule a hearing pursuant to the Hearing Request for full and substantive ALJ review of the First Review Decision and the Reconsideration Decision.

b. In the alternative, reversal of the determination in the First Review Decision and the Reconsideration Decision that Mrs. Lego was properly discharged or dischargeable from Porter as of October 10, 2001, or at any time prior to November 9, 2001, with directions on

remand to recognize coverage under the Plan for her entire hospitalization at Porter through November 9, 2001.

c. An award of attorney fees and costs as may be appropriate.
d. Such other and further relief as the Court deems appropriate.

DATED this 30th day of January, 2006.

RESPECTFULLY SUBMITTED,

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Footnote

[1] Prehearing telephone requests by Lego for a copy of that ALJ-chosen expert's report or position on any aspect of the appeal or Hearing Request were summarily denied.